MUNICIPAL BOARD DECISIONS

VOLUME NINE–A/1990

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

CHAIRMAN:	MICHAEL G. JOHNSON, C.A.
VICE-CHAIRMAN:	LINDA D. GARBER, LL.B.
MEMBER:	RICHARD L. WELDON, LL.B.

DOREEN A. FRIIS - Clerk

CLYDE A. PAUL, LL.B. - Counsel

THIS VOLUME CONTAINS ALL ASSESSMENT DECISIONS FROM JANUARY 1, 1990 TO DECEMBER 31, 1990.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

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ASSESSMENT - ASSESSABLE PROPERTY - TRANSFER OF ASSESSMENT - ASSESSMENT ACT, S. 1(a), 38, 89(1)(d), 91(1).

The assessed owner applied to R.A.A.C. to remove the value of two buildings which had been attributed to the wrong property. The R.A.A.C. declined to transfer the assessment of the two buildings to the correct property. The Director appealed.

HELD: Appeal allowed

The two buildings are assessable property. When the Board transfers assessments under s. 89(1)(a), the taxpayer has no right of appeal de novo but only a limited right to apply for leave to appeal. The timing of the Board's decision after year end, and the fact that assessable property, valued approximately, should appear on the assessment roll correctly were factors influencing the Board to exercise its discretion. When any property has been assessed in the name of a person not legally liable to be assessed therefor, the Board may transfer the assessment to the correct name and assessment account. Valuation is more an art than a science.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, c. 14, as amended, by the **DIRECTOR OF ASSESSMENT**, Appellant, from a decision of the Regional Assessment Appeal Court, Hants Assessment Appeal Region, made on May 31, 1989, deleting from the assessment roll a riding stable valued at $72,755.00 owned by **JAMES** and **LINDA DURLING**, Respondents, located at East Uniacke, East Hants, Nova Scotia, within the taxing jurisdiction of the **MUNICIPALITY OF THE DISTRICT OF EAST HANTS**, a Statutory Party.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: RANDALL R. DUPLAK, Q.C., for the Director of Assessment, Appellant;

JAMES DURLING, for himself and LINDA DURLING, Respondents;

ROBERT A. CARRUTHERS, LL.B., for the MUNICIPALITY OF THE DISTRICT OF EAST HANTS, a Statutory Party.

HEARING DATE: December 5, 1989.

DECISION DATE: January 11, 1990.

DECISION: **Appeal Allowed.**

D E C I S I O N

This is a Director's assessment appeal to place on the assessment of the Respondents' home lot at East Uniacke the value

of two buildings which had been originally assessed on another lot of the Respondents in that area. The Regional Assessment Appeal Court, Hants Assessment Appeal Region, (RAAC) had removed the value of the buildings from that other lot. The Director appealed that decision.

On May 31, 1989, the RAAC filed a decision removing the value of two buildings placed by the assessor on certain vacant land owned by the Respondents.

By a Notice of Appeal dated June 23, 1989, (filed with the Board the same date), the Director of Assessment appealed this decision. By an Amended Notice of Appeal, made pursuant to the Board's request, dated June 30, 1989, the Director attempted to perfect his appeal. This Amended Notice of Appeal recited that the Director received his copy of the decision of the RAAC on June 5, 1989.

Under Section 16(1) of the **Municipal Board Act**, S.N.S. 1981, c. 9, the Chairman assigned Board Member, Richard L. Weldon, to hear the appeal.

The Board heard the appeal agreeably to its Notice of Hearing at its December 5, 1989 sittings. These sittings occurred at the Council Chambers of the Municipality of the District of East Hants, Milford, Nova Scotia.

The Director proved service of the Notice of Appeal. The three parties active before the Board consented to the jurisdiction of the Board.

The Board found the Appellant had done all things

procedurally necessary to perfect his appeal. The Board proceeded to hear the appeal on its merits. Other jurisdictional issues arose during the course of the hearing which the Board deals with in this decision.

Counsel made opening arguments.

Mr. Duplak, for the Director, produced C. Clair Peers, Senior Assessor, to give opinion evidence on real property assessment matters as to valuation of lands and buildings for assessment purposes in the Municipality of the District of East Hants. Mr. Durling gave evidence for himself and on behalf of his Wife. Mr. Carruthers, for the Municipality, called no evidence.

Mr. Duplak, Mr. Carruthers and Mr. Durling made closing argument.

The Board did not view the site.

The text of the decision of the RAAC reads as follows:

"PROPERTY: Riding Stable & Approx. 25 Ac. Land, Mt. Uniacke Resource-General - $84,100.00 Acreage - 25 Acres

....

DECISION: Value of Riding Stables 72,755.00 to be deleted from this assessment, Stable is apparently located on other property of assessed owner. Acreage of 25 acres apparently is only 12 acres.

Appeal allowed, assessment to read
Resource General Acreage - 12 Acres.

4 AC. @ $1200.00	$4800.00	
4 AC. @ $ 700.00	$2800.00	
4 AC. @ $ 125.00	500.00	
	$8100.00	...."

The Director took no objection to this assessment per se. The Durlings take no objection at all to this assessment decided

by the RAAC.

Mr. Carruthers argued that at the RAAC hearing (held before Vice-Chairman David Fraser) he moved that the riding stable and arena buildings, as property, be assessed and their assessment be transferred to add to the assessment of other land of the Respondents which the Board will call the "house lot".

Neither his motion, nor its disposition, appears expressly in the decision of the RAAC. The RAAC decision appears regular on its face. It seems correct in that it dealt with land on which there were no buildings.

The Director, although he could find no fault with the raw land valuation, appealed this particular decision of the RAAC for the reasons contained in his Notice of Appeal which are set out as follows:

> "1. THAT the Regional Assessment Appeal Court Judge erred in ordering the riding stable valued at $72,755.00, to be deleted from the assessment.
>
> 2. THAT the Regional Assessment Appeal Court Judge erred when he failed to assess the riding stable in the among of $72,755.00 to the owners of the stable.
>
> 3. Such other grounds as may appear from the evidence."

If one were to follow a process of logic, only, in this matter, the result would be as follows:

> 1. The timely appeal of the Durlings as to valuation succeeded in reducing the valuation by removal of buildings that were erroneously located on the land.
>
> 2. There is now nothing wrong. The land is now correctly assessed and there is no building on it. On the evidence before the Board, any appeal from that decision ought to be dismissed.

3. There has been no appeal of the "house lot" initiated either by the owners or by the Director. Of course, the time for such appeal has long since expired both to the RAAC, and from it to the Board.

If this line of logic is correct then the net effect will be, for one assessment year, that some $66,000.00 worth of assessment of property that existed will not be listed and will not appear on any Roll.

Obviously the Director is now aware on which land to put the buildings. He should be able to assess them correctly the next assessment year.

Both Mr. Duplak and Mr. Carruthers argue that this type of logic can not be applied in this case under the **Assessment Act**, R.S.N.S., 1967, c. 14. The Assessor has a duty, says Mr. Duplak, to assess all property.

The **Assessment Act** in Section 1 days this:

"In this Act

(a) "assessable property" means...

(v) buildings and structures erected or placed upon, in, over, under or affixed to land, including buildings and structures under construction or partially constructed;..."

The buildings described here are, therefore, assessable property within this meaning.

Section 1(m):

""property" means assessable property;"

Section 1(nb):

""resource property" means:

(i) farm property;..."

Section 2 of the **Assessment Act** says:

> "...all assessable property...are liable to taxation for all purposes for which municipal...taxes and rates are levied by authority of law."

It is clear that the thrust of the **Assessment Act** as advocated by Mr. Duplak is that all assessable property be assessed and be made liable for the calculation of municipal taxation.

Section 15 of the **Assessment Act** shows that the Director has the duty to examine all property and to value it. Its text goes as follows:

> "The director shall ascertain by diligent inquiry and examination the names of all persons liable to be rated within the town or municipality for which they are appointed, their property within the town or municipality, and the extent, amount and nature of the same, and for such purpose shall examine each property from time to time in such detail as he shall consider necessary."

When he has done all this, the Director, under Section 23 of the **Assessment Act**:

> "...with the assistance of the assessors having ascertained as nearly as he can the particulars of the property to be assessed shall prepare the assessment roll which shall be set down
>
> (a) the location and a concise description of each separate piece of assessable property, with the name and address of the owner thereof;...".

The Director shall also classify property. Section 25(1) of the **Assessment Act** states:

> "All assessments shall be designated as being residential property, commercial property or resource property, or partly one and partly another."

In this case, the Director has designated the property as "resource". No person before the Board takes any objection to that.

The Director has a duty to set the value of the property. Section 38(1) of the **Assessment Act** states:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the town or municipality."

In valuation, on completion of the roll, the following requirements from Section 64(1A) of the **Assessment Act** are germane to this appeal:

> "The assessment shown on the roll shall be the assessment that reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll."

This property was valued as of its state December 1, 1988 effective January 1, 1989.

The powers of the RAAC under Section 89(1) of the **Assessment Act** are as follows:

> "On any appeal, the court may
>
> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed;
>
> (aa) dismiss the appeal;

(b) add to the roll the name and assessment of any person left off the roll;

(d) transfer the assessment to the proper person when any property has been assessed in the name of a person who is not legally liable to be assessed therefor;..."

Mr. Duplak says that RAAC has further powers to correct the problem highlighted in this appeal. He says the RAAC (and on its refusal, the Board on appeal from them) may act under Section 91 of the **Assessment Act**. It reads:

"(1) The court may, of its own motion,

(a) add to the roll any property that has been omitted therefrom with the value thereof as determined by it and the name of the person to whom it should be assessed; and

(b) increase the amount of the valuation of any property."

Once that property is assessed under Section 91 of the **Assessment Act** such an assessment, under Section 92, may be appealed. A person whose name or property or both have been added or whose valuation has been increased by the court under Section 91 may give notice of appeal. Section 92 of the **Assessment Act** states:

"...as provided by Section 78 and the assessment appeal court shall sit at such time and place as it shall determine, within fourteen days thereafter, to her and determine his appeal; the recorder shall give the appellant and the clerk ten days notice of the sitting in the manner provided by Section 86."

Under Section 100(3) of the **Assessment Act**, the Director may appeal a decision of the RAAC.

Under Section 101 the Board shall conduct a **de novo**

appeal hearing. Under this section the Board has all the powers of the RAAC.

Mr. Durling's arguments went to valuation and were therefore not particularly helpful on the jurisdictional and transfer of assessment issues so closely argued by Mr. Carruthers and by Mr. Duplak.

The Board is prepared to accept Mr. Duplak's arguments that, under the **Assessment Act**, the two buildings are assessable property as previously defined.

The Board agrees with the RAAC that the value of this particular property erroneously appeared on the "other lot", so-called. Therefore it was "deleted" (in the words of the RAAC). The valuation of these buildings was subtracted from the previous assessment which included land and, erroneously, these buildings.

In listening to the arguments of the two counsel, it would appear (particularly from the arguments of Mr. Carruthers) that the RAAC had been asked to add the valuation of this property [the two buildings] to another assessment. The RAAC had refused to do so without the consent of the Respondents which was neither proffered nor obtained. Mr. Carruthers contended that this action of the RAAC was a matter of discretion of the RAAC. Mr. Carruthers argued the RAAC took jurisdiction and, by its decision, implicitly exercised its discretion not to add, or not to transfer the value of the property to another assessment of the Respondents.

Mr. Carruther's argument implied that the discretionary decision that the RAAC granted was properly within the jurisdiction

of the RAAC. He implied the same discretion was available to the Board now that the assessment was on appeal de novo before the Board. Mr. Carruthers wished the Board to exercise the same discretion that the RAAC had exercised, but to exercise it in the opposite direction. Mr. Carruthers argued the Board had a discretion to transfer the assessment to the other person. He argued the RAAC silence on the transfer issue was not a matter of a jurisdictional declination by the RAAC to exercise its jurisdiction.

A jurisdictional decision by the RAAC is not reviewable, on appeal, by this Board. See Woodlawn Shopping Centre Ltd. & Clifton Management Corp. v. The Director of Assessment (NSMB-3-89-A) (unreported), under appeal to the Supreme Court, Appeal Division, leave granted, S.C.A. No. 02189, not yet argued.

The Board expressed some concern it might not have power to review this RAAC decision since it might be a RAAC decision concerning its own jurisdiction.

On a careful review of the RAAC decision, the decision shows no such decline of jurisdiction. The Board reads the decision as if the RAAC had merely exercised its discretion in not adding this property to another.

There is no crying injustice in this particular case in the factual alternatives set out above.

In the facts of this case, the Board looks to the obvious error made in the buildings' location by the assessor that was apparently not detected by anyone until the RAAC assessment appeal

hearing. The text of the RAAC decision, meticulously correct, did not preclude anyone dealing with this error if they were legally entitled to do so. Section 69(1) of the **Assessment Act** reads:

> "If in any year the Director after the assessment roll has been filed with the clerk discovers that property...of any person to an amount of not less than one hundred dollars, and which is liable to taxation, has been omitted from the assessment roll, the Director shall at any time before the end of the year in respect of which the assessment roll has been filed assess the person for the property..., and the rates thereon, at the rates fixed for the current year, shall be levied and collected in the same manner as if the property...had been on the roll when it was filed."

A person, assessed under Section 69(1), notified of the assessment under Section 69(2), has a right to appeal that assessment to the RAAC under Section 69(3). The Board wonders why the Director, given the text of the RAAC order in this case, did not use Section 69(1) of the **Assessment Act** when he discovered that the subject property of a value of over $100.00, liable to taxation, has been omitted by deletion from the assessment roll as not being located on the land forming the basis of the assessment account appealed.

The Board has no direct function in deciding whether this action of the Director was appropriate or inappropriate. The Board has a less direct interest in the Director's non-use of Section 69(1) when the Director is asking the Board to exercise its discretion under Section 89(1)(d) to transfer the same property to the assessment roll on another assessment account. When the Board transfers assessments under Section 89(1)(d), the taxpayer has no right of appeal **de novo**, but only a limited right to apply for

leave to appeal on the record.

In this case the decision of the RAAC correctly reflected the evidence before it.

Had the Director acted under Section 69(1) immediately after the decision of the RAAC, the Respondents, if dissatisfied with the assessment in any aspect, would have had a right of appeal to the RAAC. If the Director had so proceeded he would not have had to face making an appeal of a decision of the RAAC which the Board has repeatedly regarded as valid and, in effect, shutting off any real appeal of valuation if dissatisfied with the Board's decision.

The Board has the impression, dealt with in more detail later in this decision, that the Respondents had no real dispute with the value the director put on the buildings in question. The Director carefully for the Board prepared an appropriate report to support his valuation of the subject property so that the Board had sufficient appropriate evidence to determine, de novo, the value of the property for assessment purposes.

The error giving rise to this appeal was initially made by the assessor. It is the type of error that can easily be made in Nova Scotia, given our system of land titles and our system of determining assessed ownership which sometimes make it difficult to the casual observer to locate the common boundary of adjacent land in common ownerships.

It is somewhat more difficult to understand why the Director's review process did not detect the blatant error.

Perhaps the Director was not in contact with the Durlings. If there was no contact between the Durlings and the Director then the error might easily have been missed at the Director's review stage. The Director has put himself in a difficult position in asking the Board to exercise a discretion in his favour when the need to exercise that favourable discretion flowed from two errors made in his line of duty, with no apparent fault of the Durlings, and with the refusal of an experienced RAAC judge having exercised his jurisdiction by deciding the self-same issue unfavourably for the Director's position.

On the Board's discretion issue, there is then also the matter of timing. The Board hearing was on December 5. The Board was free to decide the issue on that day. The Board must, however, make its decisions in writing. The Board's delay in reducing the decision to writing is no responsibility of the Director. If the Director could have solved this problem under Section 69(1) without going to appeal to the Board, it would have been solved in the year 1989. The Director, obviously, did not think he could use that section in these circumstances. If the Director had this advice of the Board in his hand on December 5 (or thereabouts) and had he agreed with the Board's position on Section 69(1), he would have had time in 1989 to act under Section 69(1). The Director had no such advice in 1989 through no fault of his own.

The year 1989 has run out. The Board will use the Board's delay in producing this decision beyond as a final

determinate in exercising its discretion in a manner favourable to the Director's position. Had the Board's written decision followed more closely on the December 5 hearing, the discretion might well have been exercised, as was the same discretion by the RAAC, in a manner not favourable to the Director's position thus, inter alia, preserving the Respondents' right of appeal.

Another factor bearing heavily on the Board's exercise of discretion in favour of the Director grows from the Board's opinion that, in either circumstances suggested here to the Board, assessable property, valued appropriately, should appear on the assessment roll correctly.

On balance, therefore, the Board exercises its discretion in a manner favourable to the position advocated by the Director and by the Municipality.

As the most desireable available option, the Board acts under Section 89(1)(d) and transfers the assessment to the proper person (James and Linda Durling). When any property has been assessed in the name of a person who is not legally liable to be assessed therefor under the assessment number for which he was assessed, the Board may transfer the assessment to the correct name and the correct assessment account.

The Board will therefore allow the appeal under the Municipal Board Act. It transfer the properties, namely the two buildings, at their valuation to the Assessment Number to which they should be added, namely "Assessment Account Number 01347551 (James and Linda Durling) 7.4 Acres House and building", adding to

that description "(horse stable and arena)". This particular assessed property, the valuation of which we will soon deal with, should be transferred to that assessment.

The appraisal report filed by Mr. Peers differs from others the Board has seen. There is no land base placed under the buildings in the Cost of Development Approach used here. The property [the two buildings] is being purely valued as buildings, only, located in the area concerned.

The Board will make a few quick comments concerning this particular appraisal report.

It agrees that the assessor has testified there is no market value of this type of property and therefore he did not use the Market Data Approach in valuing the subject buildings.

Mr. Peers says there is no income derived from the property. Thus he is unable to make a proper calculation of the value of the property using the Income Data Approach. He therefore used a third alternative, being the Cost of Development Approach, to value the subject property.

The reasons Mr. Peers selected this third approach were not adequately expressed in the report. He should have specifically noted why this approach was the most desireable. Rather, he left one to infer that the Cost of Development Approach was the last of three maximum possible methods of valuation. If Mr. Peers feels, as he implied, that is the case he should have said so, expressly.

Whether or not that implication is correct, Mr. Peers

should have rationalized further his use of the Cost of Development Approach.

Page 1 of the report says (as to property rights) "the rights appraised are those of fee simple ownership". That may be naively correct. The Board would think that perhaps a further detailed explanation of property rights here would save confusion. People dealing in real estate valuation are usually trained to think in terms of fee simple as being a land ownership rather than a building ownership.

On page 2, there is this quotation:

> "A general level is ratio of assessed value to market value for a particular property classification. This ratio is derived from an analysis of sales and assessed values during a given period. The application of a general level ratio to the estimated market value insures uniformity of assessment value in accordance with Section 38 of the **Assessment Act**. For the subject property the level has been determined at 92.%."

The assessor, Mr. Peers, when dealing with this, relied on information of others. He made no calculation himself to determine the applicable general level of assessment ratio. He also made no inquiry to confirm whether the level given him was calculated under the "commercial" or under the "residential and resource" classifications. He made an assumption that the person who had given him the information had given him the proper information.

There, in effect, should be two general level of assessment ratios under Section 38 of the **Assessment Act**. One deals with "commercial" sales and "commercial" assessments and the

other deals with "resource and residential" sales and "resource and residential" assessments. The expert witness should spell out this distinction. Anybody viewing the appraisal report would then see that the assessor understood Section 38 and that he applied the general level of assessment [which Section 38's requirement for uniformity often calls up] to the property he is valuing.

The other techniques used in the Appraisal Report appear suitable to the Board.

Mr. Durling objected that the buildings were one foot smaller than measured by the assessor. He explained this on the basis there were two foundations pushed together. He said he had designed and worked on the building himself. He knew the building's precise measurement. Mr. Durling said the assessor's measurements were one foot out.

Mr. Durling gave the Board no further calculations on this reduction of square footage of the buildings or the effect the difference might have on the valuation of the buildings. The Board hesitates, on the dearth of information here, to make a calculation for a reduction of the assessment. On the long side of the building there would be 120' square less area for a total reduction of .993% in square footage or approximately 1%. One percent reduction in assessment would be $669.00. (This would be even less if the one foot was lacking on the short side of the building.) The Board, in buildings of such relatively minor size and value, does not wish to differ from the trained assessor for a mere 1% or $669.00. A difference in market value of this extent

in this case is too close to call. Valuation is more of an art than a science.

The Board therefore will accept, with the comments mentioned, the valuation set by the assessor in this matter even though it believes that Mr. Durling made the correct measurement of the dimensions of the buildings concerned.

For the reasons stated above, the Board allows this appeal. It orders that the assessment value of the appraised property be added to the Home Lot in the name of James and Linda Durling for the assessment year 1989 in the amount of $66,900.00.

In the circumstances outlined above, each party will bear his own costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 11th day of January, A.D., 1990.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

CYRUS JOHN v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RESIDENTIAL - NOTICE OF APPEAL - FAILURE TO SERVE IN ACCORDANCE WITH STATUTE - BOARD'S JURISDICTION - ASSESSMENT ACT S. 100(1)

The Appellant was several months late in serving a copy of the Notice of Appeal on the Halifax City Clerk. At the same time he filed a copy on the Board. The Board held a preliminary hearing at the Director's request. The Appellant argued that the Board ought to extend time to permit the appeal.

HELD: Appeal dismissed.

The documents filed seem to show the Appellant has an arguable appeal. Unfortunately for the merits of that appeal, the Board has no jurisdiction. The Appellant did not comply with section 100(1) of the Assessment Act in that he did not serve the Halfiax City Clerk within thirty days of receiving the decision of the Regional Assessment Appeal Court.

NSMB-11-89-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, c. 14, as amended, by CYRUS JOHN from a decision of the Regional Assessment Appeal Court, Halifax City Assessment Region, made on June 20, 1989, which decision reduced the Appellant's assessment by 5% from $93,000.00 to $88,400.00 for 1326 Lower Water Street, Unit 101, Halifax, Nova Scotia.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: CYRUS JOHN, acting on his own behalf, Appellant;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

PRELIMINARY
HEARING DATE: January 23, 1990.

DECISION DATE: January 31, 1990.

DECISION: Appeal Dismissed.

PRELIMINARY DECISION

This is a preliminary hearing on a taxpayer's appeal. The taxpayer is the owner of a condominium unit, 1326 Lower Water Street, Unit 101.

The Appeal is from a decision made by the Regional Assessment Appeal Court, Halifax City Assessment Region, (RAAC).

After a hearing held on May 16, 1989, the RAAC issued its decision June 20, 1989. The Recorder mailed it June 21, 1989. That RRAC decision reduced the assessment of the Appellant Cyrus John (under the name "John Cyrus") to an amount of $88,400.00.

By an undated letter, received by the Board October 6, 1989, Cyrus John filed a document. The Board acted as if this document was a Notice of Appeal. By another letter dated June 27, 1989, (Exhibit J-11) Mr. John sent a letter to the RAAC. Its Recorder received this letter on June 29, 1989. This letter referred to the RAAC decision made May 16, 1989. The text of this letter is different from the text of the letter in the "Notice of Appeal" filed with the Board.

By an undated letter with a slightly different text, Cyrus John mailed to the Halifax City Clerk another "Notice of Appeal". According to Mr. John this was the only Notice he sent the Halifax City Clerk. It was, according to the affidavit of the City Clerk, received by him on October 6, 1989.

By letter of October 13, 1989, Mr. Duplak, for the Director of Assessment (See Exhibit J-4) notified the Board that the Director wished a preliminary hearing on this appeal. The Director resisted the appeal on the jurisdictional grounds that the Appellant had failed to serve the Halifax City Clerk with a copy of the Notice of Appeal within time. Section 100 of the **Assessment Act** R.S.N.S. 1967, c. 14, sets a time limit for serving appeal notices. According to the Director, the Appellant also had not filed a copy of his "Notice of Appeal" with the Clerk of the

Municipal Board within the time period specified in Section 100(1) of the Act.

On the Director's request, the Board set down the appeal for a preliminary hearing on the issues raised by Mr. Duplak.

Under Section 16(1) of the **Municipal Board Act**, S.N.S. 1981, c. 9, the Chairman assigned Board Member, Richard L. Weldon to conduct the preliminary hearing on the appeal.

The Board heard the preliminary hearing on the appeal, agreeably to its Notice of Preliminary Hearing, at its January 23, 1990, sitting. This sitting occurred at the Board's hearing room, Nova Scotia Municipal Board, 1809 Barrington Street, Suite 510, Halifax, Nova Scotia.

In the event that the Board did not dismiss the appeal on the Director's motion, the Board set the merit hearing for this appeal for the same place, 10:00 a.m. July 3, 1990.

The Director adduced some affidavit evidence that indicated that a document, perhaps a Notice of Appeal, had been filed with the Board. The evidence indicated the Appellant received Notice of the decision of the RAAC appealed from not later than June 27, 1989. The evidence, and representations of Mr. John, also showed that the Halifax City Clerk, had not received any "Notice of Appeal" until October 6, 1989. The Board had not received for filing any "Notice of Appeal" until October 6, 1989.

Section 100(1) of the **Assessment Act**, R.S.N.S. 1967, c. 14, reads as follows:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment

appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

Mr. Duplak has urged the Board that the failure so to serve on time the Halifax City Clerk (the municipality involved) was a defect fatal to the Board. So, he said, was the Appellant's failure to file a copy of the "Notice of Appeal" with the Clerk of the Nova Scotia Municipal Board within thirty days of his notification of the RAAC decision.

Mr. John, under oath, conceded that he had not served the Halifax City Clerk with any "Notice of Appeal" until October.

Mr. John noted the nature of his employment which takes him to sea on many and divers occasions. Because of this, he argued the Board ought to extend him time to perfect his appeal and to hear it on the merits.

Taking the letters together as a Notice of Appeal, they seem to show the Appellant has an arguable appeal.

Unfortunately for the merits of that appeal, the Board has no jurisdiction to hear the appeal. The Appellant has not complied with Section 100(1) of the **Assessment Act**. He has not served the Halifax City Clerk within thirty days of receiving the copy of the Decision of the RAAC. The receipt by him of the copy of the decision of the RAAC, constituted notice to Mr. John of the decision.

The Board dismisses this appeal on this ground.

The Board refrains from dealing with the other issue raised by Mr. Duplak. He proved the Appellant failed to file a copy of the Notice of Appeal with the Clerk of the Nova Scotia Municipal Board within thirty days of the Appellant's notification of the RAAC decision. Mr. Duplak argues this filing must occur within the same 30 days.

The Board will not rule on this argument since such a ruling is not necessary for the disposition of this appeal.

The Board finds it has no jurisdiction to hear this appeal because of the lack of service of the Notice of Appeal in time upon the Halifax City Clerk.

The Board therefore dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 31st day of January, A.D., 1990.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

NICHOLSON v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RESIDENTIAL - MARKET VALUE - DIRECT SALES APPROACH.

R.N. appealed the 1989 assessment on a single family bungalow in North Sydney. The original assessment ws $78,600.00. The Director reduced the value to $75,200.00 which was confirmed by the Cape Breton Regional Assessment Appeal Court.

HELD: Appeal allowed.

The original assessment represented a 33% increase over previous assessments while the average increase for houses on the same street was 13%. The Assessor's Report compared 4 comparable properties concluding that the fair market value for assessment purposes after adjustment was $69,300.00.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, c. 14, by **RAYMOND NICHOLSON** from the decision of the Nova Scotia Regional Assessment Appeal Court, Cape Breton Assessment Region, dated November 20, 1989, which confirmed the assessed value of the property at $75,200.00 for the 1989 assessment year.

BEFORE: MICHAEL G. JOHNSON, F.C.A., Chairman.

COUNSEL: GLENN F. GOUTHRO, LL.B. on behalf of the Appellant;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: March 14, 1990.

DECISION DATE: March 26, 1990.

DECISION: Appeal Allowed.

D E C I S I O N

The property subject to this Assessment appeal is a single family residence located at 181 Brook Street Extension in North Sydney. The property is owned by the Appellant, Raymond Nicholson.

The property has a 100 foot frontage with a depth of 124 feet. The building located on this property consists of a one

storey single-family bungalow with a full basement. The main floor contains a kitchen, dining room, living room, three bedrooms (one is used as a den) and bath. The basement has one bedroom, recreation room, bathroom, laundry room with the remainder being unfinished storage. The house was constructed in 1970, mainly by the Appellant. It measures 40 feet by 29 feet. The subject property is provided with domestic water, storm sewage disposal, street lighting, curbs, paved street, as well as fire and police protection.

The property was originally assessed in 1989 for $78,600.00. On appeal by the Appellant, the Director reduced the value to $75,200.00 as permitted by Section 84(3) of the Assessment Act. As provided by Section 84(5) the Appellant further appealed his 1989 assessment to the Cape Breton Regional Assessment Appeal Court (RAAC).

In a decision dated November 20, 1989, the RAAC confirmed the assessed value of the property at $75,200.00.

By Notice of Appeal received by the Board on December 18, 1989, the Appellant appealed the decision of the RAAC on the basis that the value was not a true reflection of the actual market value of the property and that the assessed value did not take into account certain structural problems.

Mr. Nicholson testified on his own behalf, reviewing the background leading up to his appeal. He noted that his 1986 assessment was $58,700.00. In January 1987, his assessment was increased to $78,600.00. Mr. Nicholson noted that this was a 33%

increase. The average increase for other houses on his street was about 13%. Mr. Nicholson presented the Board with a variety of statistics for properties located on his street and in the neighbourhood which compared, on a percentage basis, the 1986 assessments with the amounts assessed for the 1987 assessment year. Also included in the statistics was a similar comparison for actual taxes paid. Mr. Nicholson's 1989 assessment was the same as his 1987 and 1986 assessments, which he had not appealed.

Vernon Oakley appeared before the Board on behalf of the Director of Assessment. Mr. Oakley is an assessor for the Cape Breton Assessment Region and was the author of an appraisal report presented to the Board. The Board accepted Mr. Oakley as a witness qualified to give opinion evidence relating to residential assessment matters in the Cape Breton assessment region.

Mr. Oakley reviewed the detail included in his report. He described his calculations in arriving at a fair market value by the use of the cost approach and the direct sales comparison approach. He concluded his testimony stating that in his opinion the subject property had a fair market value for assessment purposes after the application of the general level of assessment adjustment of $69,300.00. This value was arrived at by the use of the Direct Sales Comparison Approach.

During his testimony, reference was made to the chart included in his report which compared the subject property to four comparable sales properties. It was pointed out that no adjustment was made on this chart to allow for the fact that the

subject property had a garage located on it while the comparable properties did not. It was also pointed out that the chart showed that in Mr. Oakley's opinion three of the four comparable properties were in average condition while the subject property was considered to be in good condition. No adjustment was made for this apparent difference.

Mr. Oakley also stated that in his opinion no adjustment was necessary to allow for apparent structural problems in the building. The structural problems referred to were a sagging main beam and a bend in the roof line over the front door recess.

No amounts were suggested to the Board for these possible adjustments and the Board will make no change in value.

The only value for the subject property presented to the Board was $69,300.00. The Board has reviewed the appraisal report of the assessor and finds no material errors.

The Board determines that the fair market value for assessment purposes for the subject property is $69,300.00 for the 1989 assessment year.

The Board determines that no costs will be awarded in this case.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 26th day of March, A.D., 1990.

MICHAEL G. JOHNSON, F.C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

McEACHERN & McCARTHY (PIER 21) v. DIRECTOR OF ASSESSMENT

ASSESSMENT - COMMERCIAL V. RESIDENTIAL - BUSINESS OCCUPANCY - JURISDICTION TO EXEMPT CULTURAL ORGANIZATIONS - ASSESSMENT ACT, S. 2(r), 28(1).

The Appellants rent space in Pier 21 to pursue their art for self expression and not for commercial gain. Their home is too small to use for their artistic endeavours.

HELD: Appeal dismissed. No costs awarded.

Under the Assessment Act, the words "commercial" and "business occupancy" have a different meaning than they do in common usage. Once it is determined that a person is occupying or using any property in a manner which does not meet the definition of "residential" the property is deemed "commercial" and business occupancy assessment applies unless occupier is exempted. The Assessment Act does not distinguish between the use of commercial property for income purposes and for non-income purposes.

The words "used...for residential purposes", requires more than being used for an activity that might occur in the home. The Board will consider whether the premises are used for eating, sleeping and personal care by an individual on a continuing basis and whether it is a place to which the individual returns after completing work.

The renting of space to artists does not fulfil the national ports policy of support for local social objectives.

Institution in section 28(1) applies to a group of persons who operate under a non-profit organization.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act by ISLA McEACHERN and DAVID McCARTHY from a decision of the Halifax City Regional Assessment Appeal Court dated September 29, 1989, which determined that the Appellants were not exempt from the 1988 and 1989 realty or business occupancy assessment for premises located at Pier 21.

BEFORE: MICHAEL G. JOHNSON, F.C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: VINCENT CALDERHEAD, LL.B., for the Appellants;

RANDALL R. DUPLAK, Q.C., for the Director of Assessment.

HEARING DATE: April 27, 1990.

DECISION DATE: May 14, 1990.

DECISION: Appeal dismissed.

D E C I S I O N

Isla McEachern, one of the Appellants, rents space from Ports Canada. Like other local artists she has established a studio in what is a run-down warehouse on the Halifax waterfront at Pier 21 in the section known as the Central Office Building. Her husband, David McCarthy, also an Appellant, stores some of his

canvasses on the premises.

The couple resides in a small one-bedroom apartment. There is no room for them to pursue their artistic endeavours in their apartment. In addition, the toxicity of some of their artistic supplies makes them unsuitable for use in a residence.

As a tenant in a commercial building, Ms. McEachern is assessed for business occupancy assessment. Because Pier 21 is owned by a Federal Crown Corporation she is also assessed for a portion of the realty assessment for Pier 21 by virtue of Section 5(1)(a) of the **Assessment Act**, R.S.N.S. 1989, c. 23 (formerly s. 3(1)(a)).

The Board has already heard and decided an assessment appeal dealing with a number of other artists who rent studio space at Pier 21. In Director of Assessment v. Woods et al. (1989) Vol. 8-A, M.B.D. 54, the Board made the following comments at page 76:

> "The Board wishes to state that it is not unsympathetic to the concerns raised by the artists during the course of this appeal. However sympathetic the Board may feel, it only has the mandate to apply existing assessment legislation. It cannot exceed its legislative mandate.
>
> In summary, the Board determines that:
>
> a) the realty assessment was properly assessed under Section 3(1)(a);
>
> b) the subject properties are classified as commercial and thus subject to business occupancy assessment as provided by Section 7(1);
>
> c) the Board has the jurisdiction to consider the question of exemptions from business occupancy assessments under Section 25B;
>
> d) the Respondents are not exempt from business occupancy assessment."

The Appellants argue that their situation is somewhat different from the artists in the earlier case. They believe the Board can and should find:

1) that their use of the property is not commercial and therefore they are not subject to business occupancy assessment;

2) that they occupy the premises in an official category;

3) that they qualify for an exemption under s. 28(1) (formerly 25B(1)).

The position of the solicitor for the Director is that this case is identical with the earlier decision. He also argued that the Board does not have jurisdiction to consider the question of exemption from business occupancy assessment despite its decision in the Woods case.

The crux of the Appellants' argument is their pursuit of art is for self expression and not for commercial gain. Mr. Calderhead argues that the artistic expression is just as much an expression of the human needs as hunger.

He turns to the definition of "residential property" in Section 2(r) of the **Assessment Act** (formerly s. 1(naa)) and points out that it says "property used or intended to be used for residential purposes, ...". He argues that the Appellants would use their home to pursue their art if their home was larger and the toxicity problem could be avoided.

While the Appellants do not want to be considered amateur

artists, they see their art as expressing their character. Their artistic endeavours are not meant as a business although Mr. McCarthy has at least once in the past accepted a commission.

The Appellants' position is partly founded on the argument that if they had a large home where they painted, they would not be assessed business occupancy. This is not a determinant argument since the fact that someone has not been assessed does not mean that he should not have been.

Part of the difficulty in determining how property is assessed is the use of the term "commercial" in the Assessment Act. Under the Assessment Act it is a residual category meant to capture every property that is not residential property or resource property. Under the Act, "commercial" has a much wider meaning than it does in common usage. Likewise the term "business occupancy". Although the Appellants are not operating a business, they may still be liable for business occupancy assessment. Once it is determined that a person is occupying or using any property in a manner which does not meet the definition of "residential" the property is deemed "commercial" and business occupancy assessment applies unless the occupier is exempted under the Assessment Act.

In the Woods case, the Board found that all of the artists would forego their current "jobs should their art form produce sufficient income to enable them to do so".

Mr. Calderhead argues that the evidence of the Appellants is different and therefore the Board should find that their use of the premises is for residential purposes.

The Board notes, however, that Ms. McEachern has an Art Degree and she is a substitute art teacher in the public school system. Mr. McCarthy is completing his art studies and plans to be an art teacher. Ms. McEachern testified that the School Board does not demand that its art teachers pursue artistic endeavours. In the Board's opinion, it is likely that pursuing her art will be an enhancement to her professional career.

If Ms. McEachern did not have an art degree and was not an art teacher and decided to rent studio space to pursue an amateur interest in art, would the space be considered residential? The Board does not believe so.

The lease which Ms. McEachern signed states that the specific use of the premises is "studio rooms". The Lease Regulations state that the "premises shall be used only for the purpose specified in the lease and for no other purpose" unless written consent has been given.

Under the Halifax City Land Use By-law the area is zoned C-5. Recreational uses are permitted in this zone but not residential uses.

The Board is sympathetic to Ms. McEachern. The difficulty experienced by the Board is that the **Assessment Act** does not distinguish between the use of commercial property for income purposes and for non-income purposes. If the property is not classified residential, then, by definition it is commercial.

The building at Pier 21 is clearly not a residence and it is not intended as a residence. The lease and the zoning prohibit

a residential use. The fact that Ms. McEachern uses the space for an activity that others might pursue in their own homes does not change the fact that this is not a residential property.

Many offices have lunchrooms and kitchens which are exclusively used for activities that others do in their homes. This does not mean that portion of an office can necessarily be exempted from business occupancy.

In the Board's opinion, the words "used...for residential purposes" in the definition of "residential property" in the Act requires more than being used for an activity that might occur in the home. Each case must be examined on its own facts. In detemining whether the premises are "used...for residential purposes" the Board will consider, among other factors, whether the premises are used for eating, sleeping and personal care by an individual on a continuing basis and whether it is a place to which the individual returns after completing work.

Neither Ms. McEachern nor Mr. McCarthy are using the studio at Pier 21 for eating, sleeping and personal care on a continuing basis. In the Board's opinion the premises are not used for residential purposes. The premises are, therefore, commercial within the meaning of the **Assessment Act**.

The Appellants' second argument is they occupy the premises in an official capacity. This argument is founded on Section 3(1)(a) of the **Canada Ports Corporation Act** which provides as follows:

> "3(1) It is hereby declared that the objective of the national ports policy for Canada is to create a port

system that

> a) is an effective instrument of support for the achievement of Canadian international trade objectives and of national, regional and local economic and social objectives;".

The argument is that the renting of space to artists fulfills the local social objective and that the artists are therefore occupying the premises in an official capacity.

The Appellants rely on Canada v. Annapolis County (1986) 74 N.S.R. (2d.) 193 (T.D.). This case deals with non-public property owned and used by the military for recreational purposes. Civilians along with military personnel were members of the clubs which used the property. The judge found that the properties were vested in the Base Commander and he had an overriding control over the organizations. He found that the recreational activities were for military purposes and therefore the land was occupied in an official capacity.

Canada v. Annapolis County can be distinguished from this case since there is no evidence that Ports Canada personnel used the premises occupied by Ms. McEachern. In addition the renting of empty space to artists does not fulfill the national ports policy of creating a port system that is an effective instrument of support for the achievement of local social objectives.

The Board finds that the Appellants do not occupy the premises in an official capacity.

The Appellants' third argument is that they qualify for an exemption under section 28(1) of the Assessment Act (formerly s.

25B(1)).

In the Woods case the Board held that it has jurisdiction to consider the question of exemption from business occupancy assessment. The Director did not appeal that finding. Mr. Duplak continues to argue the Board does not have that jurisdiction and cites N.S. Barristers Soc. v. Director of Assessment (1981) 46 N.S.R. (2d.) 403 (T.D.) in support.

In the N.S. Barristers Society case both real property assessment and business occupancy assessment were involved. The Society's offices were housed in a Court House which by definition was exempt from real property assessment under Section 5(1)(e) (formerly s. 3(1)(e)). The Court found that the Society was exempt from real property assessment but was liable for business occupancy assessment. The Board was not in existence at the time this decision was made. The issue of who had jurisdiction to consider exemptions from business occupancy is not discussed in the decision. The case does not change the Board's position as set out in the Woods decision.

Section 28(1) of the Assessment Act provides as follows:

> "28(1) Persons occupying property for the purposes of any non-profit community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization or institution shall not be assessed for a business occupancy assessment."

The Appellants argue that the word "institution" should be interpreted broadly and not be restricted to a group of persons forming an institution. They argue that Ms. McEachern is engaged in the "institution of art" and therefore should be exempt.

The word "institution" cannot be defined separately from the context in which it occurs in Section 28. The section clearly applies to a group of persons who operate under a non-profit organization or institution the purpose of which is community, charitable, fraternal, educational, recreational, religious, cultural or sporting. Neither Ms. McEachern nor Mr. McCarthy are members of a non-profit organization or institution which is occupying the premises at Pier 21. While Ms. McEachern's work may be cultural, recreational and/or educational, it is not done for the purposes of a non-profit organization or institution.

The Appellants do not qualify for an exemption under Section 28(1) of the **Assessment Act**.

In their Notice of Appeal, the Appellants listed the following as a ground of appeal: "That the Regional Assessment Appeal Court grossly erred in law in not considering the Constitutional rights of the Appellants;". Atlthough invited to do so, the Appellants did not argue this ground of appeal at the Board hearing and the Board will therefore not consider the issue.

The Appeal is dismissed.

The Appellants were not represented by counsel when they filed their Notice of Appeal. They believed that their situation was different from that of the Appellants in the Woods case. Neither Appellant receives an income from the artistic work they do in the premises which are the subject of this appeal. In light of these facts, the Board declines to award costs in this case.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 14th day of May, A.D., 1990.

MICHAEL G. JOHNSON, F.C.A.,
Chairman.

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

DIRECTOR OF ASSESSMENT v. SOLOMAN INC.

ASSESSMENT - CHANGE OF USE - FOREST PROPERTY - ASSESSMENT ACT, S. 2(1), 47(1), (6).

S. Co. purchased property in 1988 as an investment. The Co. sells recreational water front lots and never involved in forestry industry. The property was not surveyed, subdivided or offered for resale. S. not performed any positive act on property which would support an intent to use the property for forestry purposes.

HELD: Appeal allowed. No costs.

In order to show that a change-in-use has not occurred owner must have performed some substantial act to indicate its stated intent, eg. forest property management agreement entered into, clearing or cutting, silviculture. It is not always enough to acquire a piece of forest property and just leave it untouched to support a claim that a change-in-use has not occurred.

The fact that activities associated with the company's other acquisitions has not occurred is not sufficient to support an interpretation of "some substantial act to carry out the intent". The process of doing nothing is not in itself "a substantial act" in this case.

NSMB-8-89-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act by the **DIRECTOR OF ASSESSMENT** from a decision of the **ANNAPOLIS-DIGBY REGIONAL ASSESSMENT APPEAL COURT** dated June 26, 1989, which decision found that there had not been any change of use of property located in the County of Digby owned by **SOLOMAN INC.**

BEFORE: MICHAEL G. JOHNSON, F.C.A., Chairman.

COUNSEL: RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment, Appellant;

EVERETT HALL, on behalf of Soloman Inc., Respondent.

HEARING DATE: April 25, 1990;

DECISION DATE: June 12, 1990.

DECISION: **Appeal Allowed.**

D E C I S I O N

Soloman Inc. acquired property in the County of Digby in April, 1988. A change of use tax was assessed at the time of acquisition. The company appealed the change of use tax and on June 26, 1989, it was overturned by the Annapolis-Digby Regional

Assessment Appeal Court (RAAC). The RAAC decision was appealed by the Director of Assessment. The Notice of Appeal was received by the Board on July 25, 1989.

The property consists of approximately 50 acres of forest property near the community of Bayview in Digby County. Bayview is on the west side of Lighthouse Road very near to its end. Lighthouse Road is a road which proceeds in a northerly direction from the Town of Digby towards Digby Gut. The site is irregular in shape and has a frontage of approximately 250 feet on a gravel road, known as Old Broad Cove Road. There are no services connected to this site. Hydro, telephone, police and fire protection are available. The land on the site slopes gently towards the Bay of Fundy from the Old Broad Cove Road. The ground cover is a mixture of predominantly hardwood and some softwood. The property does not have any water frontage.

Prior to its purchase by Soloman Inc., Gerald and Mary Budd had owned the property since 1967. The property was selectively cut over approximately 15 to 20 years ago.

On April 22, 1988, Soloman Inc. purchased the property for $7,500.00. Soloman Inc. is a company operating out of Prince Edward Island. In recent years it has purchased a number of recreational properties in western Nova Scotia which it has subdivided and then sold as recreational water front lots. The Company does not have any connection with the forest industry nor does it have any employees resident in Nova Scotia.

James Shephard testified on behalf of the Director of

Assessment. He is employed as a senior assessor in the Annapolis-Digby Assessment Region. The Board determined that Mr. Shephard was qualified to give opinion evidence on assessment matters relating to the Digby region. Mr. Shephard reviewed his report on the subject property and discussed his observations concerning the site.

Everett B. Hall testified on behalf of Soloman Inc. Mr. Hall is a land surveyor in Digby. He has acted as agent for the Company in the acquisition of a number of properties in the area. In fact, Mr. Hall had advised the Company to acquire the subject land because it was a good investment for forestry potential.

Before the Board Mr. Hall stated:

> "It was a good buy as simple forestry land or woodland. It was bought with that intent. They have never planned to do anything with the property at all other than to leave it in its raw state and let it, actually to let the wood grow, and to increase the value of the property. At some point down the road when the trees have reached maturity, of course, the property is going to be greater in value. They have never carried on any surveying. They have never gone to the expense of surveying. They have never subdivided the property which further shows their intent not to develop the property or to change the use of the property."

He went on further to state:

> "There is no question that Soloman has acquired a number of properties which they have subdivided and developed and sold on the market. However, that should not prevent Soloman from buying a piece of woodland and letting it mature and increase in value as woodland".

Section 47(1) of the **Assessment Act**, R.S.N.S. 1989 c. 23 (formerly s. 40(B)(1)) states as follows:

> "All forest property bona fide used or intended to be used for forestry purposes shall be exempt from taxation

under this Act or any other public or private Act of the Legislature authorizing a tax on the assessed value of property, except as provided in this Section."

Section 47(6) of the **Assessment Act**, R.S.N.S. 1989 c. 23 (formerly s. 40(B)(6)) deals with a change in use tax and states as follows:

> "In the event that the forest property, or any part of it, ceases to be land bona fide used or intended to be used for forestry purposes, this Section shall cease to apply and a change-in-use tax equal to twenty per cent of the value, determined by the assessor pursuant to Section 42, of the land or part thereof to which this Section ceased to apply, shall become due and payable to the municipality in which the land is situate, unless the land or part thereof becomes farm property to which Section 46 applies, in which case no change-in-use tax is payable."

Section 2 of the **Assessment Act**, R.S.N.S. 1989 c. 23 (formerly S.1) contains various definitions. Section 2(i) (formerly 1(fa) states:

> "(i) "intended to be used" means a present intent supported by some substantial act to carry out the intent;".

Mr. Shephard in his testimony reviewed the calculations that he carried out in valuing the property at $10,850.00 for assessment purposes as at January 1, 1986. Mr. Hall did not disagree with this value. The property actually had an assessed value of - taxable $800 - exempt $6,700. The assessed value has not been appealed and therefore is not under consideration by the Board.

The issue of the application of change of use tax on forest property was addressed in the Director of Assessment v.

Eascan Development Corp., (1988) 7-A M.B.D. 247. At page 250, the Board made the following observation:

> "Subsection (6) of Section 40B provides that the change in use tax becomes due and payable when forest property ceases to be land bona fide used or intended to be used for forestry purposes. Section 1(fa) of the Assessment Act defines "intended to be used" as meaning "a present intent supported by some substantial act to carry out the intent". It should be noted that the issue is not whether the land ceased to be forest property but whether it ceased to be land bona fide used or intended to be used for forestry purposes. This means that the land must be actively used for forestry purposes or a substantial act must have occurred which supports an intent to use the property for forestry purposes.
>
> In Green Meadows Estates Ltd. v. Director of Assessment et al (1984), 26 M.P.L.R. 33 (N.S.C.A.), the Appeal Court held that the date for the change of use tax is not when a new use takes effect but on the cessation of the existing use. While that case involved a change of use from farm land to residential, the applicable section is similar to s. 40B."

Based on the facts before it the Board is of the opinion that the subject property is still forest property. The question to be determined is whether or not it is has ceased to be land bona fide used or intended to be used for forestry purposes.

Soloman Inc. acquired the subject land as an investment because of its attractive price. It has the present intent of holding the land until such time as it increases in value. It may very well increase in value because of the maturity of the forest growth located thereon. Mr. Hall stated he was unsure whether or not the company's future intent for the property was to sell as forest property at an increased value, or to selectively cut it itself.

Mr. Hall argued that the new owners of the property have done nothing different than the previous owners and therefore should not be assessed for change of use tax. Mr. Hall stated that the property has not been surveyed, subdivided, offered for resale or had any of the other activities performed as on other property acquisitions by Soloman Inc.

The Director felt that the circumstances of the purchase of the property by the company were sufficient to support a position that the property had ceased to be bona fide used for forestry purposes and a change of use tax was imposed.

Soloman Inc. is not involved in the forest product industry in either Nova Scotia or Prince Edward Island. Its history of activity in Nova Scotia has been the acquisition of recreational property for investment purposes and not forestry purposes. Based on the evidence presented by the assessor the Board is satisfied that the Director has established a prima facie case for the imposition of the change of use tax.

The Board has reviewed the evidence of the company's representative to determine if it was sufficient to rebut the Director's position and show that the company has not ceased to bona fide use or intend to use the property for forestry purposes. Because the Company's history of operation in Nova Scotia has been real estate investment the Board feels the Section 2(i) definition for "intended to be used" is important. It is the Board's opinion that in order for the company to show that a change in use has not occurred it must have performed some substantial act to indicate

its stated intent.

The evidence clearly shows that the company did not perform any positive act on the property which would support an intent to use the property for forest purposes. There were no roads built, no forest property management agreement entered into, no clearing or cutting performed and no silviculture carried out. The Board is not suggesting that all or any of these acts must occur to avoid a change of use tax assessment, nor is the Board suggesting that the above listing of considerations is intended to be complete. However, the Board feels that some act must occur to support the company's intent. The **Eascan** decision supports this position. It is not always enough to acquire a piece of forest property and just leave it untouched to support a claim that a change of use has not occurred.

In addition, the fact that the activities associated with the company's other acquisitions has not occurred for this acquisition, is not, in the Board's opinion, sufficient to support an interpretation of "some substantial act to carry out the intent". The Board does not accept as a premise that the process of doing nothing is in itself "a substantial act" in the circumstances of this case.

In **Eascan** the lands subject to appeal had changed hands a number of times prior to the ownership of **Eascan**. The Board, when defining "change of use" also determined that the change of use had occurred on a transaction prior to the ownership of **Eascan**. The Board cannot make such a determination in this appeal. The

evidence shows that the previous owners had selectively cut the property in the past. Nothing had occurred in the intervening period to indicate a change in their intent or that the property had ceased to be bona fide used or intended to be used for forestry purposes by the previous owners.

The Board is of the opinion that, at the time of the change of ownership, a change in use has occurred and that the change in use tax was appropriately assessed. The Board is not satisfied that Soloman Inc. bona fide used or intended to use the subject property for other than investment purposes.

The Board hereby allows the appeal and determines that the subject property has ceased to be bona fide used or intended to be used for forestry purposes as of April 22, 1988.

No costs will be awarded to either party.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of June, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

CHRISTENSEN v. DIRECTOR OF ASSESSMENT

ASSESSMENT - JURISDICTION - SERVICE OF NOTICE OF APPEAL - ASSESSMENT ACT, S. 86(1).

Appellant did not serve the Municipal Court, the Regional Director of Assessment nor the Director of Assessment.

HELD: **Appeal dismissed. No costs.**

The Board strictly follows section 86(1) relating to timing of service of Notice of Appeal. Since the evidence shows required parties not served, the Board does not have jurisdiction to hear the merits of the appeal.

NSMB-3-90-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1989, c. 23, by **SUZANNE CHRISTENSEN**, from a decision of the **REGIONAL ASSESSMENT APPEAL COURT, LUNENBURG ASSESSMENT REGION**, dated March 16, 1990, respecting residential property located in the District of Chester.

BEFORE: MICHAEL G. JOHNSON, F.C.A., Chairman.

COUNSEL: LEIF CHRISTENSEN, on behalf of the Appellant;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: June 21, 1990.

DECISION DATE: July 17, 1990.

DECISION: Appeal Dismissed.

D E C I S I O N

The Board held a jurisdictional hearing on June 21, 1990, in the hearing room of its offices located in Halifax, Nova Scotia.

Mr. Duplak, on behalf of the Director of Assessment, entered three Affidavits, one was sworn by Barry Lenihan, Clerk/Treasurer for the Municipality of the District of Chester,

another was sworn by Geary Romkey, Regional Director of Assessment for the Lunenburg Assessment Region. The third Affidavit was sworn by Robert F. Warren, Provincial Director of Assessment. All three stated that they had not received copies of a Notice of Appeal from Suzanne Christensen.

Mr. Christensen admitted that Notice of Appeal had not been served on the Municipal Clerk, the Regional Director of Assessment nor the Director. He stated he was unaware of the requirement to do so and had only filled out the form that he had received with his copy of the Decision of the Regional Assessment Appeal Court.

Section 86(1) of the Assessment Act, R.S.N.S. 1989, c. 23 (formerly 100(1)) states as follows:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the clerk of the municipality in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the Clerk of the Nova Scotia Municipal Board, and not otherwise."

The Board strictly follows this section relating to the timing of service of Notices of Appeal and upon whom the notices are to be served (See Aubrey Silver v. Director of Assessment, (1988) 7-A, M.B.D. 214.

Since the evidence clearly shows that the required parties were not served with a Notice of Appeal as required by the Assessment Act the Board determines that it does not have

jurisdiction to hear the facts relating to the appeal and dismisses the appeal.

The Board awards no costs for such a brief hearing.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of July, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

ALISON'S FASHIONS v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RECLASSIFICATION - COMMERCIAL - BUSINESS OCCUPANCY - ASSESSMENT ACT, S. 14(7), 56, 62, 167(1).

The appellant purchased a residential property in 1987 for $245,000.00 and did extensive rennovation to use as a retail store. The building sold in 1990 for $495,000.00. In 1989, it was assessed as residential property at $159,700.00. A new Notice of Assessment was issued reclassifying the property as commercial but not increasing valuation and business occupancy was assessed. The Appellant argued that the assessed value was too high given the deteriorating vacant buildings across the street. The Director argued that valuation could not be raised since the new Notice of Assessment only dealt with classification. The Notice of Assessment cited the wrong section number.

HELD: Appeal dismissed.

The wrong section number does not affect the validity of the assessment.

There is nothing in Section 56(4) or Section 62 which limits the right to appeal from a new Notice of Assessment to the issue of classification. Taxing statutes are strictly construed:

There is nothing in Section 14(7) or Section 62 which precludes an appeal on valuation from a Notice of Assessment for business occupancy.

Evidence of deterioration in a neighbourhood sometimes results in a reduction of the assessed value. In this case the deterioration occurred after the effective date of the assessment and would more properly be considered in the subsequent year. Given the price paid for the building, the extent of the rennovation and the amount that the building sold for, it appears the assessed value is low.

NSMB-2-90-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act by **ALISON'S FASHIONS** from a decision of the Halifax City Regional Assessment Appeal Court dated February 5, 1990, respecting the 1989 real property assessment and business occupancy assessment for 1456 Brenton Street.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: TOM OLAND, on behalf of the Appellant, Alison's Fashions.

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: August 22, 1990.

DECISION DATE: September 14, 1990.

DECISION: Appeal Dismissed.

D E C I S I O N

Alison's Fashions is a sole proprietorship which operated a retail ladies clothing business at 1456 Brenton Street in Halifax. Tom Oland owned the property and operated Alison's Fashions.

Mr. Oland purchased the building in 1987 for $245,000.00. He opened the business on December 4, 1987. The business closed in the spring of 1990. Mr. Oland sold the property on June 29, 1990 for $495,000.00.

Mr. Oland is appealing the 1989 real property assessment and the business occupancy assessment. The original Notice of Assessment for 1989 was for residential property with a value of $159,700.00.

On May 26, 1989, the Director of Assessment sent a new Notice of Assessment to Mr. Oland which reclassified the property as Commercial and set the value at $159,700.00. The Notice also includes the following:

> "Section 69A(1A)
> Effective date; Jan. 1, 1989".

A Notice of Assessment for Business Occupancy for Alison's was also sent on May 26, 1989. The assessed value was $79,800.00.

Mr. Oland appealed both Notices on May 29, 1989. He stated the following as his grounds:

> "An increase of four times our last years assessment is perposterous considering the deplorable level of services. My business is too new to afford this luxury."

The Regional Assessment Appeal Court dismissed both appeals in a decision dated February 5, 1990.

At the Board hearing, Mr. Oland introduced photographs showing conditions along Brenton Street during 1989. His major

concern is that the residential buildings located across the street from his business were purchased and then left vacant as part of the expansion of Spring Garden Place. As a result of the buildings being boarded up, they began to be used for various illicit activities. According to Mr. Oland this resulted in a decline in the number of customers coming to Alison's.

Mr. Oland said the buildings were vacated in March and April 1989 but they were not demolished until the fall of 1989. Mr. Oland regularly called the police to come and remove persons from the street and to ticket illegally parked cars. He complained to city officials about the state of decline along that portion of Brenton Street.

Mr. Oland stated that he wished to have a portion of his taxes rebated because of the situation. He approached city officials but they advised him to pursue the matter through this appeal procedure.

It is the position of the Director of Assessment that the new Notice of Assessment, issued in May, 1989, only dealt with a reclassification of the property. Since the assessed value was not appealed in January when the original Notice was issued, the Appellant cannot appeal the amount of the assessment.

The Director further points out that the Appellant objects to the increase in taxes resulting from the reclassification and not the actual assessed value which did not change in amount.

The Board has reviewed the two Notices of Assessment

issued in May. There is nothing on either Notice which states it has been "amended", only a reference to an effective date of January 1, 1989. There is nothing on the face of either notice that prohibits an appeal of the assessed value.

The commercial property assessment notice received by the Appellant refers to Section 69A(1A). This is not the proper section. It deals with the reclassification of commercial property to residential or resource. The correct section is 69A(1), now section 56(1) of the **Assessment Act**, R.S.N.S. 1989, c. 23. The wrong section number does not affect the validity of the assessment by virtue of Section 167(1) of the **Assessment Act** which states as follows:

> "No error, informality or irregularity on the part of the council, the assessor, the assessment appeal court, the recorder, the clerk or any other officer, and no error or ommission in giving any notice required by this Act to be given, shall affect or prejudice the validity of any general or individual assessment made or of any rate rated, distrained for or collected."

Subsection (4) of Section 56 states that an amended assessment may be appealed under Sections 62 and 63. Section 62 is the general section dealing with appeals from assessment. It permits a person to appeal various matters including "that his property has been over-valued by the assessor".

There is nothing in section 56(4) or section 62 which limits the right to appeal from a new Notice of Assessment to the issue of classification. Taxing statutes are strictly construed. If the Legislature had intended to limit the right of appeal, it should have specified it in section 56(4).

The Board does not believe that the Legislature had such an intention. The fact that a person might not appeal the assessed value for a residential property does not mean that he/she agreed with the value. The cost of an appeal could be such that it is not worth the effort. When that same property is reclassified as commercial, resulting in a different level of tax, and subject to business occupancy assessment, it may well be worth the cost of an appeal.

The Notice of Assessment for Business Occupancy was issued under section 10 [now section 14]. Subsection (7) of that Section allows a person to appeal a business occupancy assessment under Section 62. There is nothing in either section which precludes an appeal on the issue of valuation.

With respect to the argument that the Appellant is concerned with the taxes and not the assessment, this is not unusual. Persons without an assessment or legal background are not always concerned with the distinction between the two. They want to see their taxes reduced. A method to reduce property tax, is to reduce the assessed value. The Board tries to explain this to the unrepresented Appellant. The Board should ensure that the Appellant is given an opportunity to adduce evidence to show that the assessed value is too high.

In this case, the Appellant has led evidence to show there was a deterioration in the neighbourhood during 1989. This type of evidence sometimes results in an assessment being reduced. In general, the evidence would need to show a long term

deterioration and not one of a few months.

The deterioration occurred in the spring and summer of 1989. Section 52(2) of the **Assessment Act** requires that the 1989 assessment reflect the state of the property as it existed on December 1, 1988. On that date, the properties on Brenton Street had not yet been vacated. It appears to the Board that the evidence presented might more properly be considered in determining the 1990 assessment. The Board is advised that the 1990 Notice of Assessment was not appealed.

The Director of Assessment filed a report dealing with the Classification Appraisal of Alison's. The Director did not file a report dealing with the assessed value.

The evidence shows that the assessed value of $159,700.00 had not changed from the value placed on the property in January, 1986, when it was then classified as residential. Since that time, Mr. Oland purchased the property for $245,000.00 and did extensive renovations. A Building Permit issued on July 27, 1987, shows an estimated cost for interior renovations to the building of $30,000.00. Mr. Oland sold the property in June, 1990 for $495,000.00.

Based on these facts, it appears that the 1989 assessed value of $159,700.00 was low. The Board is not prepared to vary it.

The Board is satisfied that the Appellant operated a commercial business in the subject premises.

The property is properly classified as commercial. The

assessed value is set at $159,700.00 with a business occupancy assessment of $79,800.00.

The Board dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 14th day of September, A.D., 1990.

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

DIRECTOR OF ASSESSMENT v. PACIFIC DEVELOPMENTS LTD.

ASSESSMENT - PARTIES - FAILURE TO RESPOND TO DEMAND FOR INFORMATION - ASSESSMENT ACT, S. 86(4).

R.A.A.C. found that P.D. Ltd. lost its right of appeal when it failed to respond to a demand for information. R.A.A.C. found that an officer of the company had appealed in his own capacity. The director appealed this latter finding. Evidence was adduced to show a course of action by the individual in signing Notices of Appeal for various companies.

HELD: **Appeal allowed. Costs to the Director.**

Notice of Appeal was signed not in personal capacity but as an authorized agent or officer of the company.

The matter to be fully investigated is the matter raised by the Notice of Appeal.

The Board discussed a number of other issues which were not raised by the Notice of Appeal.

NSMB-4-90-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act by the DIRECTOR OF ASSESSMENT from a decision of the DARTMOUTH REGIONAL ASSESSMENT APPEAL COURT dated March 27, 1990, which decision dismissed the Director of Assessment's objections to hearing of the appeal by ALAN SILVERMAN as agent for PACIFIC DEVELOPMENTS LIMITED.

BEFORE: RICHARD L WELDON, Member

COUNSEL: RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment, Appellant;

DAVID SILVERMAN, agent on behalf of Pacific Developments Limited, Respondent, and Alan Silverman, Respondent

HEARING DATE: July 19, 1990

DECISION DATE: September 21, 1990.

DECISION: Appeal Allowed.

DECISION

This is an appeal by the Director of Assessment (Director) from certain of the findings made by the REGIONAL ASSESSMENT APPEAL COURT, City of Dartmouth Assessment Region (R.A.A.C.) March 27, 1990 concerning real property at 65 King Street, Dartmouth. The Respondent owner tax-payer, Pacific Developments Limited, made no cross appeal.

At the R.A.A.C. hearing, the Director succeeded in having Pacific Developments Limited prevented from having its assessment appeal of the subject property heard because of Pacific's failure to respond to the Director's demand for information. The Director felt the information demanded was necessary for the Director's preparation of the assessment. The Director did not appeal this particular finding.

The R.A.A.C. went on to find Allan Silverman signed the Notice of Appeal in his personal capacity as a person with an interest in the property. He was entitled, in that capacity, to proceed with the appeal as to the proper amount of assessment of Pacific's King Street property.

Before the R.A.A.C. went on to place a value on the property for assessment purposes, the Director appealed this interim R.A.A.C. decision to the Board.

From this introduction, one discerns that this appeal concerns law rather than facts.

PRELIMINARY MATTERS

The Respondent Corporation was represented at the hearing not by counsel but by an agent, David Silverman. No party raised any preliminary issues.

Since the matters at stake had little to do with the state of the property, the Board took no view of the property.

JURISDICTIONAL MATTERS

The Board finds that both parties active before the Board consented to the Board's jurisdiction to hear the appeal. The Board finds that the Appellant has done all that is required to prove that the Board has jurisdiction to hear this appeal. The Board therefore determines it has such jurisdiction.

PROCESS OF THE APPEAL

Under Section 16(1) of the MUNICIPAL BOARD ACT R.S.N.S. 1989,c.297, the Chairman assigned Board member, Richard L. Weldon to the Board's sittings for the conduct of this appeal. The Chairman prescribed under Section 16(3)(a) that the number of members to attend the hearing of the appeal as one member. Under section 16(3)(b), the Chairman prescribed that the quorum in respect to the appeal be one member.

Mr. Duplak, counsel for the Director, gave opening remarks. On the appeal he then called Theresa Marsh, Richard Colborne, and Barry Woodward. David Silverman cross-examined none of these witnesses although invited in each instance to do so. Mr. Silverman called no evidence for the Respondent, Pacific Developments Limited or for Alan Silverman, the other Respondent. Mr. Duplak made closing argument and tendered the Board a written memorandum. Mr. Silverman presented closing argument.

The Board reserved its decision, which it now delivers.

The operative part of the Director's Notice of Appeal reads:

"1. THAT the Regional Assessment Appeal Court Chairman erred in law in finding that Alan Silverman who was President

of Pacific Developments Limited, signed the Notice of Appeal in his personal capacity rather than as an officer of Pacific Developments Limited.

2. That the Regional Assessment Appeal Court Chairman erred in law when he determined that Alan Silverman had an interest in the property as used in subsection 77(3) of the Assessment Act R.S.N.S., c.14, as amended to 1988."

Thus the Director would have this appeal focus on these narrow grounds. The evidence he called and the arguments he initiated were directed to these issues.

ISSUES

The Board sees the following issues as applying to the situation surrounding this R.A.A.C. decision and this appeal:

1. Is the appeal to the Board from R.A.A.C. PREMATURE in that the decision of the R.A.A.C is an interim and not a final decision?

2. Is the appeal to the Board inappropriate in that the R.A.A.C. had no jurisdiction to conduct the review that it did and give the remedy that it did? If so, does the remedy for such behaviour lie with the Board or elsewhere?

3. Is the finding of the R.A.A.C. that the landowner, Pacific Developments Limited, was not entitled to appeal because of its violation of the disclosure on notice sections of the Assessment Act an issue that could be determined by a R.A.A.C.? Was it a matter of assessment to be determined under the then Section 108 of the Assessment Act?

4. Given the R.A.A.C. finding of landowners disentitlement to appeal its assessment for the instant assessment year, can the Board, on appeal, in this appeal deal with the issue of disentitlement which was dealt with in the R.A.A.C. decision? Should it?

5. Did Alan Silverman sign the Notice of Appeal in his personal capacity rather than as an officer/authorized agent of Pacific Developments Limited?

6. If he did so, did he then, in his personal capacity, qualify as an appellant because he had an interest in the property.

ARGUMENTS

The last two issues were pleaded, and strenuously contested both in evidence and argument by the Director in an attempt to forward the Director's desired results. The Director engaged in some argument with the Board concerning issues one and three when discussion on these points was initiated by concerns expressed by the Board. The Board recalls no argument or discussion at the hearing on issues two and four.

The views of PACIFIC DEVELOPMENTS LIMITED and/or ALAN SILVERMAN were rather passively forwarded by David Silverman. His approach to these issues were straight forward:

1. The decision of the R.A.A.C. was correct in all respects and should be followed or left undisturbed.

2. That there was some meritorious reasons that could be given for the failure of Pacific Developments Limited to respond to the informational demands of the Director.

3. In his argument, Mr. Silverman conceded that the Director's demands were in order and useful for the proper valuation of the property. Regardless of Pacific's failure to disclose, the assessor had an over-riding positive duty to assess the property. The Director should have assessed the property regardless of Pacific's failure to return the information demanded. Mr. Silverman suggested there were other methods of assessing the property than using the income approach, and, had the assessor used some of the other approaches to valuation he could have arrived at a valuation which would have reflected the true value of the property. (The Board infers that the "true value" so arrived at would be much less than the valuation now on the property for assessment purposes.)

Mr. Silverman did not comment on the jurisdictional issues implicit in issues one, two, three and four except as above.

FACTS

The facts, in the circumstances as outlined above, are those that are adduced by the Appellant Director together with anything else the Board may garner from the record before it.

The Board notes two main rulings included in the decision of the R.A.A.C. decision:

> 1. "I find that a request for information was properly made of Pacific Developments Limited, and David Silverman rather boldly acknowledges the forms were received at Pacific's office and not returned. Although no charge was laid for failure to return the information, I find that Pacific has lost the right to appeal for 1990. [emphasis that of the Board]"

For obvious reasons, the Director did not appeal this portion of the decision. For some reason, the Respondent, Pacific Developments Limited, did not appeal this portion of the decision either.

> 2. "...concerning the personal nature of the appeal by Alan Silverman, I accept his assertain [sic, intended to be 'assertion'] that his brother signed the appeal notice in his personal rather than corporate capacity. In signing his notice, Alan Silverman gave no indication of representative capacity. Mr. Silverman's standing to appeal as a non-owner of this property, must be found in either sub-section (2) or (3) of Section 77 (R.S.N.S. 1967, chapter 14),...There is no evidence before me that Alan Silverman is a ratepayer in the City of Dartmouth so subsection (2) does not apply. ...[does he have] an interest in this property as a shareholder of... the owner[?]. I believe the legislature probably intended "interest" as used in subsection 77(3) to mean proprietory interest" or "interest in land". This would give such interested persons as mortgagees, tenants, or legatees of estates which hold properties, a right to appeal. However, I was referred to no authority which required that I place such restrictive interpretation on the wording of

> this subsection. As a taxing statute, the Assessment Act must be strictly interpreted so as to benefit the taxpaying public where possible. It is with some regret that I find Alan Silverman has an interest in this property and is entitled to appeal. As he is the "controlling mind" behind the corporate owner, I find that notice of appeal was given to Pacific Developments as required by subsection 77(3).... Alan Silverman and Pacific are two different legal persons. In the absence of strong authority, I decline to pierce the corporate veil in this instance.

The learned Chairman of R.A.A.C. then proceeded to change the Appellant to "Alan Silverman" and sent the appeal back for a Director's review and a subsequent hearing by the R.A.A.C. if such became necessary.

The Director, in his Notice of Appeal, did not question this direction by the R.A.A.C. to the Director. The Director's appeal was directed narrowly to the issue of Alan Silverman being an Appellant in his personal capacity. Under this theory, Alan Silverman was a person who had an interest in the property sufficient to qualify him as an appellant under the Assessment Act entitled to appeal the Respondent Pacific's assessment.

There was little evidence (from a quantity standpoint) called before the Board. The Director called all of it.

The assessor, Theresa A. Marsh, presented her report on the status of Pacific Developments Limited as an Appellant. In her opinion, she felt Pacific's "appeal be denied" for the year 1990.

In the assessment contained in that report she wrote:

> "In order to arrive at a proper assessment for an income producing property it is necessary to have accurate

> income and expense information pertaining to the property relevant to the base date of the assessment. ...in accordance with Section 21 of the Act, any person who has been requested to supply information is required to provide that information within thirty days... . ...The request forms for this property have never been returned. In accordance with Section 23 of the Act, the penalty for non-compliance to a request for information is the loss of the right to appeal the assessment on the property for the year in respect to which the information was requested"

Ms Marsh did not say which person in authority could refuse the right to appeal.

The Director advanced documentary evidence to show how Alan Silverman was an official in numerous real estate holding companies and organizations owning land within the Halifax and Dartmouth assessment regions. The documents show how Alan Silverman and the responsible officials of the Provincial Assessment organization dealt with each other on matters pertaining to the assessment of those properties.

These dealings, most of which did not concern the subject property, are germane to the outcome of this appeal.

An example taken from Exhibit P-7 is summarized in Schedule "A" to this decision. This exhibit demonstrates that when making corporate assessment appeals for Strad Realty Limited, Alan Silverman signed on behalf of the Company. On Notices of Assessment he most often did not sign the rear or appeal side of the forms with a description of himself as an officer of the company. In the matter of Strad Realty Limited, Alan Silverman signed as its corporate officer once. He signed fifteen times without reference to his corporate officer status. The

uncontradicted evidence shows that in these cases, at least, he was signing for Strad Realty Limited, not Alan Silverman.

In the same exhibit, he signed a Notice of Assessment for another real estate company, Seacoast Tower Services Limited, in the same manner. The resultant attached decision of the R.A.A.C. October 24, 1989, demonstrates, again without contradiction, that in the case of Seacoast, Mr. Alan Silverman was signing for the company and not for himself in his personal capacity.

The Board could go on.

Suffice it to say, the Board finds that documentary exhibits produced by the Director and uncontradicted by the Respondent tend to demonstrate that Alan Silverman is, and has been for some time, a responsible officer in various real estate corporations owning property in the Halifax-Dartmouth Metropolitan area. As such officer, he has signed numerous Notices of Appeal for these various corporations (including, in some instances, the present corporation) in the same manner as the signature was made in the instant appeal.

The Notices produced by the Director dealt with many properties with a gross value of millions of dollars of assessment and yet were signed with less than total adherence to conventional corporate signing standards.

In all of these transactions, the present is the only one (according to the uncontradicted evidence) that Alan Silverman purported and purports to be signing in his personal capacity rather than as an authorized agent/officer of a corporation or

organization.

The uncontradicted evidence shows that the Director had no confusion as to the assessments of the various individual properties to their individual corporate owners.

DELIBERATIONS OF THE BOARD

Because they deal with the only two issues formally appealed in writing to the Board,the Board will first deal with issue 5 and then issue 6 as if it had jurisdiction to hear this appeal on these grounds only.

"5. Did Alan Silverman sign the Notice of Appeal in his personal capacity rather than as an officer/authorized agent of Pacific Developments?"

At the R.A.A.C. hearing, David Silverman clearly distanced Alan Silverman's signature from that of the signature of Pacific Developments Limited. Pacific Developments Limited was entitled at any time to revoke any agency it had made, including any agency to Alan Silverman. Alan Silverman did not set out with his signature, in the conventional manner, his office with Pacific on the Notice of Appeal.

From the date of the hearing of the R.A.A.C. at least, the R.A.A.C. and the Board (having no knowledge of the internal workings of Pacific except that provided by David Silverman), must accept Alan Silverman's lack of agency declared in this matter. Pacific can appoint and disappoint agents at will.

That is not the question in this appeal. The question in this appeal is whether, when he signed the Notice of Appeal, Alan

Silverman was acting as an agent for Pacific Developments Limited or was he signing in his personal capacity? By a reasoning process set out in his decision, the learned Chairman of the R.A.A.C. concluded that at that time Alan Silverman was signing in his personal capacity and not as an agent of the corporation authorized to sign the notice of appeal.

With respect, on the facts adduced before the Board, the Board cannot arrive at the same conclusion

1. Alan Silverman was an officer of the company;

2. Alan Silverman was a major shareholder of the company;

3. The Notices of Assessment directed to the company and to other like companies, came into the possession of Alan Silverman for action and he acted upon them in this case and in other cases. It is obvious that Mr. Silverman was detailed in the ordinary course of business to deal with notices of assessment, not in his personal capacity, but as an agent/officer of the company.

4. The company name on the front side of the Notice of Appeal, in the absence of an express repudiation, in these circumstances, coloured the signature made by Alan Silverman on the reverse side.

5. No mention of the personal capacity of Alan Silverman arose until the Director objected to the Pacific's status to continue the appeal because of its non-disclosure.

Mr. Duplak cited H. L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd. [1957] 1 Q.B.D. 159. At page 172 Denning, L. J. says:

> "...A company may be in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in

> accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors or managers who represent the directing mind and will of the company, and control what it does. The state of the mind of these managers is the state of the mind of the company and is treated by the law as such....[p173] So here the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and other relevant facts and circumstances of the case."

The Board has perused the factual details set out in Bolton, and cannot discern the failure of any company official to append his office in the company after his signature, which is the precise case here. The Board does note that the case decided that all corporate formalities need not be complied with once the corporate intention becomes objectively manifest.

In Freeman & Lockyer (A Firm) v. Buckhurst Park Properties (Mangal) Limited and another [1964] 2 Q.B.D. 480, one Kapoor, a director in the Defendant company, acted in his own name as developer and owner of the company's land with the acquiesence of the company's directors. While doing this, he hired the Plaintiff to do some planning work which was not paid for. The issue became who was liable to the Plaintiff for this unpaid bill Kapoor (personally), or the Defendant company. The head note states:

> "...although K. was never appointed managing director, he had acted as such to the knowledge of the Board of Directors...and...he had ostensible authority as he acted

throughout as managing director to the knowledge of the Board. ...K.'s act in engaging the plaintiffs was within the ordinary ambit of the authority...".

In Freeman , as in this case, it was to the company's legal advantage to attribute the act complained of to the person of a director rather than to the corporation. Yet the court held that, in Freeman , the total circumstances clothed the director with an agent's authority to bind the company.

Mr. Duplak also cited Lennard's Carrying Company, Limited v. Asiatic Petroleum Company, Limited [1915] A.C. 705. The ship's managing agent was one J. Lennard. The ship's owners was the Appellant. The owner's manager for the ship was another corporation. J. Lennard was on the Board of Directors of both companies. The ship burned because it was unseaworthy. The owners claimed they were statutorily discharged from the legal effect of the unseaworthiness to the extent that the loss occurred without "their actual fault of privity."

Without hearing from Respondent's counsel, the House of Lords made the following findings:

> "[p712] ...Mr. J. M. Lennard...appeared to be the active spirit in the joint stock company which managed this ship for the appellants.
> ...
> [p713] ...a corporation is an abstraction. It has not mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who is really the directing mind and will of the corporation, the very ego and centre and personality of the corporation. ...Mr. Lennard took the active part in the management of this ship on behalf of the owners, and...therefore was the natural person to come on behalf of the owners and give full

> evidence not only about the events...which related to the unseaworthiness of the ship, but about his own position and to whether or not he was the life and soul of the company...[p714] the company is liable because his action is the very action of the company itself. ...Mr. Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action. But Mr. Lennard did not go into the box to rebut the presumption of liability and we have no satisfactory evidence as to what the constitution of the company was or as to what Mr. Lennard's position was....the inference to be drawn is that the officials of the two companies were very much the same and transacted very much the same business."

In Lennard's, it was in the company's interest to leave the knowledge in an individual and not the company.

Canadian Laboratory Supplies Ltd. v. Englehard Industries of Canada Ltd. 97 D.L.R. (3d) 1, is a Canadian Supreme Court of Canada case cited by Mr. Duplak. A minor employee (Cook) of the Plaintiff secured the delivery and payment of the platinum from the Defendant. Cook saw to the purchase of the Platinum with apparent duly authorized usual purchase orders and saw to the payment in the Plaintiff's usual course of business. He fraudulently diverted the delivery of platinum to a fictitious person (himself by another name) and then resold the platinum as scrap back to the Defendant. This scheme went on for years. Because of the difficulties with the time of the payments by the Plaintiff, their Defendant contacted the purchasing agent of the Plaintiff to complain. Cook handled the complaint for the Plaintiff and the complained of payment delay was corrected.

When the fraud was eventually discovered, the issue for

the courts became; which of the corporations would suffer the loss in what proportions?

The plaintiff argued that the goods were stolen from it and the defendant could receive no property in stolen goods. The defendant argued that the sale to the plaintiff was final and that it was entitled to segregate the sale back to it and that sale was also final in that the plaintiff's agent acting with ostensible authority had resold the scrap to it. The plaintiff said Cook had no authority to do what he had done, that he was a minor employee of the company with no real or apparent authority to bind the plaintiff, and that therefore property in the scrap did not pass back to the defendant.

The court split the loss. Before enough facts were communicated to the Plaintiff (by the letter of complaint) the Plaintiff could not know of the transaction since it was not authorized by the Company through a duly authorized agent. Once a responsible official received the complaint, the Plaintiff was put on its guard to enquire into the actions of its employee. It chose not to do so. It corrected the item of complaint. From these actions the Defendant was then entitled to rely on estoppel to deny the lack of authority to Cook.

This case deals with the legal effects of lines of authority in a larger corporation with numerous employees of varying degrees of authority. It demonstrated that a company employee could, in the same transaction stream, have no authority to bind the company and later, in the circumstances, have

ostensible authority to bind the company.

In the case under appeal there never was a doubt that Alan Silverman was a director, an officer and, at least, part of the guiding mind of Pacific Developments Ltd. The issue was, did he sign personally, or on behalf of Pacific?

On the evidence adduced, the Board has no doubt that, at the time Alan Silverman signed the Notice of Appeal in the appeal to the R.A.A.C., he signed as an authorized agent or officer of Pacific Developments Limited and not in his personal capacity.

Furthermore, if Alan Silverman were not actually authorized to sign this Notice of Appeal on behalf of Pacific Developments Limited because of his course of conduct, amply shown in the evidence adduced, he acted in such a manner that the Director was entitled to believe (and did believe) that Alan Silverman was the ostensible officer/agent of Pacific with authority to sign the Notice of Appeal on its behalf.

In these findings, on issues raised in the Notice of Appeal to this Board, the Board respectfully disagrees with the findings of the R.A.A.C.

The Board holds the opinion Pacific Development Limited by its officer Alan Silverman, signed the Notice of Appeal to the R.A.A.C. Alan Silverman did not sign the Notice of Appeal in a personal capacity.

> "6. If he did so, did he then, in his personal capacity, qualify as an appellant because he had an interest in the property?"

Given the answer to issue 5, issue 6 becomes moot. There is no suggestion (and the Board believes there is no possibility in the facts of this case) that Alan Silverman signed the Notice of Appeal both in his personal capacity and as officer of Pacific. It was one or the other. The Board is of the opinion that the evidence leads to the latter conclusion.

The Board will, therefore, not deal further with Alan Silverman's personal status as qualified appellant.

The Board finds itself quite comfortable with its findings on issues five and six, the issues raised directly in the Notice of Appeal to the Board.

The other issues, mentioned above exist and deserve some comment even though all were not argued fully from both sides. One was not argued at all. The Board mentioned it in passing at the hearing. Neither of the active parties discussed the issue. None were raised by the only Notice of Appeal filed with the Board.

> 1. Is the appeal to the Board from the R.A.A.C. PREMATURE in that the decision of the R.A.A.C. is an interim and not a final decision?

The document on file with the Board as Exhibit 2-8 purports on the face to be a "Decision." The Board has perused numerous other decisions of various R.A.A.C.'s and the format and content of the decision is not unusual.

What is unusual is the lack of finality of the decision which the Board commonly sees in R.A.A.C. decisions.

Section 85 of the Assessment Act reads:

Any person aggrieved by a decision of the

> assessment appeal court, including the clerk on behalf of the municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board.

The Supreme Court of Nova Scotia, Appeal Division, recently applied this section in the case of Woodlawn Shopping Centre v. Nova Scotia Municipal Board S.C.A. 02189 (unreported), and dealt with the issue on page 2 of the decision:

> "...There can be no doubt that when on March 17, 1989, the assessment appeal court dismissed the appellant's application, it rendered a decision.
>
> From there on it is a matter of tracking the plain and unambiguous language of the Act. By Section 99[the present 85], quoted above, the appellants may appeal the decision to the Board."

In that sense, what the Board has before it is a decision of the R.A.A.C. Under the direction contained in Woodlawn, regardless of the interim nature of the R.A.A.C. decision, the Board has to review that decision at the instance of an appeal initiated by the aggrieved Director.

> "2. Is the appeal to the Board inappropriate in that the R.A.A.C. had no jurisdiction to conduct the review that it did and give the remedy that it did and that the remedy for such behaviour lies elsewhere than with the Board?

The R.A.A.C. according to its text of the decision was reviewing an assessment in which a Notice of Appeal of assessment had been filed by the assessed landowner and in which the Director had failed (or refused) to conduct his review of the assessment complained of. The R.A.A.C., in effect, ordered the Director to

conduct his review reserving jurisdiction to the R.A.A.C. to further review the Director's findings should the Appellant recognized by it, Alan Silverman, be dissatisfied with the Director's review.

Under Section 15(2) of the Assessment Act, the Director shall be responsible for the assessment of all properties required by the act to be assessed.

Under Section 18 of the Assessment Act, the Director shall ascertain the names of all persons to be rated within the Municipality their property and the value thereof.

Under Section 25 of the Act, he shall prepare an assessment roll of all properties.

Section 32 states that property shall be assessed as property of the owner.

Section 42 of the Act provides for the valuation of property by the assessor.

Section 53 of the Act requires the Director to give notice of assessment to each person liable to be rated.

Section 62(1) allows any person complaining of his assessment to give notice in writing to the recorder of the R.A.A.C. Pacific did so in this case once it received its Notice of Assessment from the Director.

Section 64 of the Act provides that the R.A.A.C. will hear the appeal.

Section 68(1) provides that the recorder will send a copy of the Notice of Appeal to the Director within 10 days of its

receipt by the recorder. The Board infers from the context of the R.A.A.C. decision that this was done in this case.

Section 68(2) requires the Director to forthwith review the assessment complained of, and he may confer with both the appellant and the respondent. The Board cannot tell from the evidence before it whether or not that was done by the director. It assumes the Director made no review from the text of the R.A.A.C. decision.

Section 68(3) of the Act allows the Director, after review of the assessment, to alter the assessment and notify the clerk and the recorder of the change. From the text of the R.A.A.C. decision the Board infers that the Director never conducted the review contemplated by Section 68(2) and therefore he did not, to this date, alter the assessment.

Consequently, the Director did not serve any amended Notice of Assessment upon the appellant as required by Section 63(4).

When no amendment has been made under Section 64(3), the appeal shall proceed in the manner provided by the Act. This, apparently, is what occurred here. The Board assumes that the recorder gave the Notice of Hearing required by Section 70(1). Under Section 72 (1) the R.A.A.C. has a duty to determine the matter brought before it.

Section 74 of the Assessment Act deals with the powers of the R.A.A.C. It reads:

"74 (1) On any appeal, the court may

(a) confirm, reduce or increase the valuation of the property that is subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding the occupancy assessment was not appealed; [The R.A.A.C DID NONE OF THESE HERE]

(b) dismiss the appeal; [THE R.A.A.C. DID NOT DO THAT HERE]

(c) add to the roll the name and assessment of any person left off the roll; [THE R.A.A.C. DID NOT DO THAT HERE]

(d) strike off the roll the name of any person wrongfully entered thereon; [THE R.A.A.C. DID NOT DO THAT HERE.]

(e) transfer the assessment to the proper person when any property has been assessed in the name of the person who is not legally liable to be assessed therefore; [THE R.A.A.C. DID NOT DO THESE HERE.]

(f) Where any property has been assessed more than once, strike out the assessment that is improper or illegal; [THE R.A.A.C. DID NOT DEAL WITH THIS SITUATION IN THIS APPEAL.]

(g) change the classification of all or part of the property that is subject of the appeal; and [THE R.A.A.C. MADE NO SUCH CHANGE HERE.]

(h) correct any clerical errors made by the assessor in the assessment roll. [THE R.A.A.C. DID NOT DO THIS HERE.]

The R.A.A.C. has further powers under Section 76 of the Act. There was no need to call on those powers in this appeal.

In this case, the R.A.A.C. in its decision purported to do five things:

1. It found that Pacific had lost its right to appeal. The Board will pass mention on this aspect of the R.A.A.C. decision when it deals with issue 3 of this appeal.

2. It found that Alan Silverman signed

the Notice of Appeal in his personal capacity. The Board, for the reasons set out in detail earlier in this decision does not agree with that finding of the R.A.A.C.

3. It found that Alan Silverman was the signatory appellant of the appeal before it. It found he was a person with an interest in land entitling him to appeal the assessment on Pacific's land. The R.A.A.C., in the view of the Board, given its finding under 2 supra had the necessary power to determine, under the Assessment Act, the status of any appellant before it. (See specifically Section 62(3) of the Act.) The R.A.A.C. must, for its own jurisdiction, have the power to determine who is and who is not properly before it. For the reasons stated above, in the view of the Board, on appeal from the R.A.A.C. this question does not arise in this appeal since Alan Silverman was never [says the Board] an appellant. This matter was raised by the Director's grounds of appeal to the Board and the Board, on such appeal, dealt with it. To say this, is not to say that the R.A.A.C. had no jurisdiction to make the decision it did. The Board merely says the R.A.A.C. made the

wrong decision.

4. It ordered that the matter be sent back, apparently for review, to the Director. If the Board were asked, having made the statutory review of the R.A.A.C. powers outlined above, it does not see any power in the R.A.A.C. to order the Director to make a review. The Director has a statutory duty to make a review. The Board does not discern any statutory power for the R.A.A.C. to order as it did. In any event, the fact that the R.A.A.C. conducted a hearing of the appeal before it, is an indication that the Director failed to make a review and that therefore Section 68(6) of the Act applies. The Board was not asked by the issues formally raised, in writing, by the Notice of Appeal to determine this question.

5. The R.A.A.C. maintained jurisdiction to recommence the hearing of the appeal if persons were dissatisfied with the Director's review. If the Board were asked, it would seem to it that even if the ordering of the review by the R.A.A.C. were in accord with the Act, the retention of jurisdiction for the purpose of continuing with the hearing of the

appeal on its valuation merits "if necessary" flies in the face of the statutory provisions of the Director's review process. The Director's review process established in the Act contemplates, once the Director changes an assessment:

(a) a fresh amended notice of assessment to the parties concerned;

(b) a further Notice of Dissatisfaction by any party dissatisfied with the amended notice of assessment;

(c) and failing such notice by any party, abandonment of the appeal.

The decision of the R.A.A.C. here makes it uncertain whether or not the abandonment option would automatically prevail.

Again, the Board was not asked by the issues raised by any Notice of Appeal to determine this question.

The Board on any appeal before it has the duty under Section 87 of the Assessment Act to inquire into the matter de novo and shall take all such proceedings as are requisite for a full investigation of the matter. On the appeal, the Board shall have all the powers of the R.A.A.C.

Section 86(4) of the Act reads:

"(4) A Notice of Appeal shall state with particularity the grounds of the appeal."

In this matter, there are two active opponents. The Director who initiated the appeal to the Board (with the full government resources and sophistication in assessment matters that

implies) opposed to the landowner and/or land oriented business man/lawyer also proven to have resources and assessment sophistication.

The Board agrees, in such circumstances, the Director is entitled to draft his Notice of Appeal in accordance with Section 86(4) and expect to have the Board deal with those legitimate issues therein raised. The Board in such circumstances agrees that the Respondents, did not also file a Notice of Appeal (Cross-appeal). The Respondents are sufficiently sophisticated in such matters to choose not to be represented by counsel and to choose not to appeal any rulings the R.A.A.C. may have made against it/them.

In such circumstances, the Board is prepared to find that the "matter" to be fully investigated is the matters raised by the Director's Notice of Appeal. Those matters having already been resolved in the Board's treatment of issues 5 and 6, the Board refrains from determining issue 2, because it is not raised by Notice of Appeal or by party originated argument. In the absence of full argument, the Board is hesitant to enter into an area of supervision of the process of the R.A.A.C. where it may have not jurisdiction and therefore the Board declines to decide issue 2.

> 3. Is the finding of the R.A.A.C. that the landowner, Pacific Developments Limited, was not entitled to appeal because of its violation of the disclosure on notice sections of the Assessment Act an issue that could be determined by a R.A.A.C., or was it a matter of Assessment to be determined under the then Section 108 of the Assessment Act?

The argument on this issue rose at the initiative of the

Board, was reluctantly replied to by the counsel for the Director, and was not addressed by the Respondent's representative. On this issue at the Board level, there are a couple of decided cases.

Re Spiropoulos (1983) 2 M.B.D. 173, was decided on the basis of an omitted service of a necessary notice of appeal. During the case, the Appellant argued that the decision of the R.A.A.C. refusing to hear the appeal because the taxpayer had failed to answer the Director's demands for information was outside the jurisdiction of the R.A.A.C. and therefore the decision of the R.A.A.C. was null and void. Time could not run from a null and void decision and therefore the Appellant still had time to perfect his appeal. In an editorial comment by the headnote writer this appears:

> "The Board held that the decision remained valid 'until such time as someone with proper authority declares the decision void,' and the proper authority to do this is the Supreme Court of Nova Scotia, not the Municipal Board."
>
> [at p 182 the Board writes] ... If the decision of the Regional Assessment Appeal Court is null and void there would not be a decision to appeal to the Board. The Judge of the Regional Assessment Appeal court may or may not have exceeded his jurisdiction in reaching his decision in this particular case. ...the decision of the Regional Assessment Appeal Court is a valid decision until such time as someone with proper authority declares the decision void. ...the proper authority to determine whether the decision of the Regional Assessment Appeal Court is void is the Supreme Court of Nova Scotia and not the Nova Scotia Municipal Board."

Given the intricate argument as to time made by the Appellant in Re Spriopoulos, it is not quite fair to categorize the

Board's "null and void" findings as obiter dicta. As such,they seem to indicate the Board can avoid dealing with certain R.A.A.C. findings on jurisdictional grounds.

Director of Assessment v. Lord Nelson Hotel Limited/Lord Nelson Hotel Limited v. Director Assessment (1984), 3-A M.B.D. 173, decided that the issue of disentitlement to appeal because of taxpayer's failure to respond to the Director's demand for information was not a matter appealable to the Board, but was a matter of assessment to be handled only by a reference to the Supreme or County Courts. The Headnote accurately sets out the Board's position in Lord Nelson Hotel:

> "1. The Board does not have jurisdiction to determine whether the Company has lost its right to appeal and therefore the Company is not precluded from appealing its 1981 assessment.
>
> [at p174 the Board says]... Section 20 of the Assessment Act does not stipulate who should determine whether a person has lost his statutory right of appeal it could not have been the intention of the Legislature that the assessor who is given the power to demand information should also be given the judicial power to decide the person did not comply with his demand. This is a 'question relating to the assessment' aside from 'a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed too high or too low a sum or whose property is wrongly classified' (s.108(1)0. The legislature has given the Board a limited jurisdiction in assessment matters and it does not include a determination as to whether the Company has lost its right of appeal. This must be decided on application to the Supreme Court of county Court, and there is no evidence that this has been decided in this case."

The Director did not appeal Lord Nelson Hotel. Instead,

counsel for the Director applied to the Supreme Court as suggested by the decision in Lord Nelson Hotel). Mr. Justice MacIntosh in The Director of Assessment and the City of Halifax v. Lord Nelson Hotel Limited (1984), S.H. No. 49649, (unreported as far as the Board's knowledge extends) starts his reasoning useful to this appeal at p3:

> " The 'question relating to assessments' respecting which a declaration is requested is whether the Nova Scotia Municipal Board has the power to determine a right to appeal has been lost by virtue of Section 20 of the Assessment Act, and similarly whether the Regional Assessment Appeal Court has the power to determine whether a right to appeal has been lost by virtue of the same provision. ...[p8]
>
> The Court on consideration of Section 35(1) and 37(1) of the Municipal Act[sic should be Municipal Board Act] questioned whether Section108 of the Assessment Act was the proper forum whereby challenge may be made to a decision of the Board. Submissions were then requested of counsel on this preliminary [this emphasis of the Board]. ...
>
> Counsel ...[made] reference [to cases which]...[p9] all involve situations where the applicants were by-passing the Regional Assessment Appeal Court and seeking declarations from the Courts; non involved a challenge to a decision of the Municipal Board. ...In 1981 the Municipal Board Act abolished appeals to the County Court substituting therefore appeals to the Municipal Board. Previously this procedure placed no restrictions on the right to appeal a decision of the County Court. The Municipal Board Act now requires that leave be granted by a Judge of the Appeal Division before an appeal can be taken from an order of the Municipal Board (s.35(1)).
>
> It seems unlikely the Legislature intended to provide two avenues of appeal to deal with the same issue in different levels of the court

> system. It would be giving decisions of the County Court and Trial Division of the Supreme Court equal judicial weight with that of the Appeals Division...[p10] The wording of the section indicates no decision on the particular question and the seeking of directions before proceeding further. That is not the situation here, where a decision has been made by the Municipal Board and is being challenged by the applicants. ...
>
> Section 35(1) provides that an appeal lies from an Order of the Municipal Board 'upon any question as to its jurisdiction or upon any question of law.' Whether or not the respondent has lost its right to appeal by reason of Section 20 of the Assessment Act clearly falls within these grounds of appeal. ...[p11]
>
> Here the Municipal Board made a determination of an issue concerning its jurisdiction to hear an appeal from a decision of the Regional Assessment Appeal Court.
>
> In my view the proper procedure to have been followed in this instance was an appeal under the provisions of Section 35(1) of the Municipal Board Act."

Lord Nelson Hotel, did not resolve the jurisdictional issue raised by the Board's decision in Lord Nelson Hotel, but defined the issue as a jurisdictional one which a party disagreeing with the result should appeal, on application for leave, to the Supreme Court, Appeal Division.

The Director did not find Lord Nelson Hotel, 's decision to his liking so he appealed that decision to the Supreme Court, Appeal Division in Director of Assessment and City of Halifax v. Lord Nelson Hotel Limited 70 N.S.R. (2d) 301, MacDonald J.A., writing for the Appeal Division said:

> "[p306] ...s. 35 of the Municipal Board Act is and was intended to be the sole appeal

> provision with respect to decisions by the Municipal Board. Not only is it the later enactment but its provisions appear exhaustive...
> The question at issue here is not, strictly speaking, relating to assessment but rather is one pertaining solely to jurisdiction. I doubt if a question relating solely to the jurisdiction of the Municipal Board falls within the meaning of the phrase "any question relating to the assessment... ."

In result, the Appeal Division in Lord Nelson Hotel Limited, sustained the Trial Division in Lord Nelson Hotel, which, as it was shown above, did not reverse the Board in Lord Nelson Hotel, which was never appealed.

The Trial Division said the City should have followed the appeal provision. One might then conclude that the matter of who has taken away the right to appeal is still an open question although it is apparently not "a matter of assessment under Section 108".

Counsel for the Director cited The Director of Assessment v. Wedgewood Motel Limited and the City of Halifax (1980) C.H. 33165, (unreported as far as the knowledge of the Board extends). In that County Court case, OHEARN, J.C.C. ruled that the form of the Section 20 demand was defective and that he, therefore, would not dismiss the Appellant's right to appeal its assessment. He discussed the fact that he was a Section 96 Court and as such, had a full arsenal of other remedies which may not be available to non-section 96 Board Members. This case is not a direct authority for the proposition that the R.A.A.C. can stop a person's right of appeal for failure to provide the Director's demanded information.

Woodlawn, on a different issue, seemed to define the outward boundaries of the Board's jurisdiction as being wider than the Board thought in Lord Nelson Hotel.

On issue three, it might be found that the Board has no jurisdiction to determine whether an appellant has lost his right to appeal for failure to disclose. Having made that finding the Board would find no difficulty, on reading the applicable legislation, that in such a case, the R.A.A.C., like the Board, has no jurisdiction to enforce remedies for taxpayer's failure to disclose. That being so, the R.A.A.C. would have no jurisdiction to determine whether or not an appellant has lost his right to appeal for failure to disclose on director's notice. Therefore, one might conclude that the matter might be a matter amenable only to collateral prerogative relief as discussed in Wedgewood II.

This matter was not raised by any Notice of Appeal. The Respondent's agent did not pursue it. The Board has discussed the issue as best it understands it. The Board can fully respond to the issues raised in the Notice of Appeal without recourse to issue 3, especially when it applies the reasoning in Re Spiropoulos, and thus it declines to make a determination of issue 3.

> 4. Given the R.A.A.C. finding of landowners disentitlement to appeal its assessment for the instant assessment year, can the Board on appeal in this appeal deal with the issue of disentitlement which was dealt with in the R.A.A.C. decision? Should it?

The Board has the powers of the R.A.A.C. The reasoning directed to issue 3 is even more applicable to issue 4. For the

same reasons set out in its discussion of issue 3, the Board believes it can decide the issues raised by the Director in his Notice of Appeal without deciding issue 4 and thus it declines to do so.

DISPOSITION OF APPEAL

For the reasons stated above, the Board allows the Director's appeal.

Having decided that Pacific Developments Ltd. is the signatory Appellant to the R.A.A.C., the Board looks to the circumstances surrounding the attempt of the company to repudiate its signature ex post facto and feels that, in these circumstances, there is no reason why costs should not follow the event.

The Board therefore awards the Director costs of these proceedings against the Respondent, Pacific Developments Ltd. (but not against the Respondent Alan Silverman in his personal capacity) to be taxed on the County Court scale, as prevailed prior to January 1, 1990.

The Board designates Mr. Arthur Hare, Q.C. as the person to tax costs.

An Order will issue accordingly.

Dated at Halifax, Nova Scotia this 21st day of September, 1990.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE A

EXHIBIT/DOCUMENT/	CORP NAME /	DATE	SILV	OFFICE	BACK	FRONT
P-7 LETTER	STRAD R.L.	5/23/90	Y	SECRET	N/A	Yes
N.Ass	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	"		Y	PERSON	No	Yes
" "	SEACOAST TOWER		Y	PERSON	No	Yes
APPEas	?		Y	PERSON	No	Yes
decis	SEACOAST	10/24/89	Y	N/A	N/A	Yes
N.Ass.	?		0	N/A	N/A	N/A
Letter	DofA	6/15/87	N/A	BOTH	N/A	BOTH
N.A.Ass	SEACOAST TOWER		Y	Off.	Yes	Yes
decis	"	" 11/25/88	Y	Off.	Yes	N/A

SCHEDULE B

1. H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd. [1975] 1 Q.B. D. 159

2. Freeman & Lockyer (A Firm) v. Buckhurst Park Properties (Mangal) Limited and another [1964] 2 Q.B.D. 480

3. Lennard's Carrying Company, Limited v. Asiatic Petroleum Company, Ltd. [1915] A.C. 705

4. Canadian Laboratory Supplies Ltd. v. Englehard Industries of Canada Ltd. 97 D.L.R. (3d) 1

5. Woodlawn Shopping Centre v. Nova Scotia Municipal Board S.C.A. 02189 (unreported)

6. Re Spiropoulos (1983) 2 M.B.D. 173

7. Director of Assessment v. Lord Nelson Hotel Limited/Lord Nelson Hotel Limited v. Director of Assessment (1984) 3-A M.B.D. 173

8. The Director of Assessment and the City of Halifax v. Lord Nelson Hotel Limited (1984) S.H. No. 49649 (unreported as far as the Board's knowledge extends)

9. Director of Assessment and City of Halifax v. Lord Nelson Hotel Limited 70 N.S.R. (2d) 301

10. The Director of Assessment v. Wedgewood Motel Limited and the City of Halifax (1980) C.H. 33165 (unreported as far as the knowledge of the Board extends)

1776875 NOVA SCOTIA LTD. v. DIRECTOR OF ASSESSMENT

ASSESSMENT - DATE OF SERVICE OF NOTICE OF ASSESSMENT - NOTICE OF APPEAL - LATE FILING - PREVENTED BY SUFFICIENT CAUSE - ASSESSMENT ACT, S. 53(2), 63(1), 84(1).

Company gave Notice of Appeal to Regional Court two days late arguing that it was given within 21 days of receiving the Notice of Assessment. In the alternative it argued that it was prevented by sufficient cause from appealing the assessment. Regional Court refused to grant hearing on the merits.

HELD: Appeal dismissed.

The 4 methods of service of the Notice of Assessment in s. 53(2) have equal status. The completion of the act of service does not mean the person has actually received the notice. It is the doing of the act that results in service. The date of mailing the Notice of Assessment is the date of service and the 21-day appeal period would normally run from that date.

Although there may have been a delay in delivering the Notice of Assessment because of an error in the postal code, the Notice was received in sufficient time for a Notice of Appeal to be given within the 21-days. Officers of the Appellant company could have taken steps to ensure that the Notice was delivered on time. The Appellant was not prevented by sufficient cause.

NSMB-1-90-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act by 1776875 NOVA SCOTIA LTD. from a decision of the Lunenburg Region, Regional Assessment Appeal Court dated March 16, 1990.

BEFORE: MICHAEL G. JOHNSON, Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: RICHARD HIRSCH, LL.B., for the Appellant,
RANDALL R. DUPLAK, Q.C., for the Director of Assessment.

HEARING DATE: August 29, 1990.

DECISION DATE: September 24, 1990.

DECISION: Appeal Dismissed.

D E C I S I O N

This is an appeal from a decision of the Regional Assessment Appeal Court for Lunenburg Region under Section 84(1) of the Assessment Act. The Court refused to grant the Appellant, 1776875 Nova Scotia Ltd., a hearing on the merits of the appeal. The Appellant is seeking an order from the Board to require the

Regional Assessment Appeal Court to hear the Appellant's appeal of the 1990 real property assessment of land it owns in Lunenburg County.

On the morning of January 15, 1990, the Notices of Assessment for the Province were mailed from the Post Office located at 6175 Almon Street in Halifax. Some Halifax residents received their Notices of Assessment on January 15, 1990. The Notice of Assessment is dated January 16, 1990.

The Appellant's Notice was mailed to its former office at 1200 Tower Road in Halifax. The Appellant had moved its office to Hollis Street in March, 1989 and its new mailing address was a post office box used by associated companies. The Appellant did not advise the Director of Assessment of this new address.

The address on the Notice also included a postal code. The postal code was incorrect for the street address, however, it is the correct postal code for the Appellant's post office box.

The Appellant's administration is handled by a management company. The management company arranged for its receptionist to attend at 1200 Tower Road, which is an apartment building, on a daily basis to pick up any mail for the Appellant or its associated companies. On January 19, 1990, the receptionist, Kim Hurley, picked up the Notice of Assessment from 1200 Tower Road. On her return to the main office she date-stamped the Notice. She then gave it to the Management Company's Accountant in accordance with the standard practice in the office. Ms. Hurley keeps a record of her attendance at 1200 Tower Road . The record

shows she was there every day between January 15th and 19th.

At some point the Accountant apparently gave the Notice of Assessment to the Management Company's Controller. The Management Company received other Notices of Assessment in 1990. These were given to David Reynolds, another officer of the Management Company. Mr. Reynolds had reviewed these other Notices of Assessment and had initiated appeals of some of them.

For reasons which are either unknown or were not explained, Mr. Reynolds did not receive the Notice of Assessment for the Appellant's property in Lunenburg from the Controller until he asked where it was on February 5, 1990. The assessment was for $1,018,500.00. Mr. Reynolds discussed it with the President of the Company who forthwith instructed him to appeal. Mr. Reynolds completed and signed the Notice of Appeal and mailed it to the Recorder on February 5, 1990.

The Recorder did not receive the Notice of Appeal until February 8, 1990. In the Recorder's opinion, the Notice was late. The Recorder arranged to have the matter set down for a preliminary hearing on March 16, 1990, pursuant to section 84(1) of the Assessment Act. This section gives the Regional Assessment Appeal Court power to grant a hearing on the merits where the Notice of Appeal was not given on time.

The Regional Assessment Appeal Court apparently refused to grant a hearing on the merits. The wording of its decision dated March 16, 1990, states "appeal disallowed".

The Appellant filed a Notice of Appeal from that decision

with the Board on March 29, 1990. The Appellant is relying on a recent decision of the Nova Scotia Supreme Court, Appeal Division, Woodlawn Shopping Centre v. Municipal Board (1990), 96 N.S.R. (2d.) 93. This decision ordered the Board to hear an appeal from a similar dismissal by a Regional Assessment Appeal Court.

The Appellant has two alternative arguments. The first is that the Notice of Appeal was given on time. The second is that the Appellant had sufficient cause for not giving the Notice of Appeal on time.

Section 63 of the Assessment Act sets out the time requirements for the Notice of Appeal from an assessment. Subsection (1) states in part:

> "63(1) The Notice of Appeal...shall be given not later than twenty-one days after the Notices of Assessment are served as provided in Section 53."

Section 53(2) provides four methods of serving the Notice of Assessment and states as follows:

> "53(2) The Notice may be served either personally or by leaving it at the residence or place of business of the person assessed or by posting it in a conspicuous place on the property assessed or by mailing it, postage prepaid, addressed to his last or usual place of residence or business, if known to the assessor, but where such place of residence or business is not known to the assessor, failure to serve shall not render invalid the assessment or any subsequent proceedings based on the assessment."

Both the solicitor for the Appellant and the solicitor for the Director agree that for each of the first three methods of serving, service is perfected on the day that the act occurs, i.e. personal service, leaving the Notice at the place of residence or business or posting it on the property. They disagree on when

service by mailing is perfected.

The Appellant's position is that service is not perfected until the person receives the mail. The time for giving the Notice of Appeal does not start to run until the taxpayer receives the Notice of Assessment.

The Director's position is somewhat confusing. The solicitor advised the Board that the Director's position was that service was perfected two days after mailing in accordance with Civil Procedure Rule 10.12(4). Exhibit N-1, the Report filed by Lynn Wamboldt, Senior Assessor, however, contains a page from the Recorder's Manual which reads in part as follows:

> "It is the position of the Director of Assessment that the day of service is the actual day of mailing which is on the front of the Notice. The 21-day appeal period begins the day after the day of mailing."

Neither party can point to any specific authority in the Assessment Act to support their respective positions.

As noted earlier, the Notice of Assessment is dated January 16, 1990, although it was mailed on January 15, 1990. The Notice includes the following statements:

> "And take notice that if you wish to appeal *these valuations or classifications the appeal must be filed with...on or before 21 days after the service of this notice. The date below is deemed to be the date of service of this notice."

On the back of the Notice of Assessment the following statement appears:

> "Your Notice of Appeal must actually be received, not only mailed, by the Recorder within that 21-day period".

The Assessment Act has many sections which deal with serving, giving or filing notices. Most of these sections are different. There are no general deeming provisions. An appeal to the Board, for example, is to be served "within thirty days from the day when notice of the decision was received".

For notices under Section 141 "service" is "good and sufficient" if it is mailed postage prepaid by registered letter, among other methods.

Since there is no deeming provision, it is necessary to interpret the words in Section 53(2). The four methods of service are given equal status. Each of the first three methods are effective at the time of completing the act. Except for personal service, the completion of the act does not mean that the person has actually received the notice. It is the doing of the act that results in service.

A similar argument can be made for mailing the notice. The act as specified in the section has been completed and service is complete.

A contrary argument is that when you leave or post the notice on the premises, you know that it has reached its intended location. Placing a letter in the mail does not provide the same knowledge. It should be noted that the Civil Procedure Rule deeming service to be effected 2 days after mailing does not provide knowledge either. In any event, the Civil Procedure Rules do not apply to Board proceedings.

The Appellant cited a number of cases on the issue of

service by mail. These cases are not directly on point since in this case, the Appellant did receive the Notice of Assessment before the 21 days expired but failed to ensure that he gave notice of its appeal on time.

A Notice of Assessment is required to be served every year. There are provisions in the Act requiring a person to notify the Director if a business ceases to operate or the address is changed. The failure to appeal an assessment in one year does not preclude a successful appeal in the subsequent year.

Section 9(5) of the Interpretation Act sets out the matters to be considered in interpreting statutes. These include "the occasion and necessity for the enactment; the object to be attained and the consequences of a particular interpretation".

Assessment notices have to be served on a great many people within a short time period. The Act gives a limited time for appealing a notice of assessment. This is necessary since municipal funding is dependent on the value of the assessment. A person is deemed to know the law and therefore that real property owned or occupied for business purposes is subject to taxation. As noted above a person is not precluded from successfully appealing in the subsequent years.

This is not a situation in which the Director or the Regional Assessment Appeal Court took action knowing that a person was not served.

The Board finds that the mailing of the Notice of Assessment is service and the 21 day appeal period would normally

begin to run from the date of service.

In this case the Notice specified that service is on the 16th not the 15th when the Notice was mailed. A Notice of Appeal, therefore, was required to be given by February 6, 1990.

If the date of mailing the Notice of Assessment is deemed to be the date of service, can the date the Notice of Appeal is mailed be deemed to be the date the Notice of Appeal is given? Unfortunately, the answer is no. There is no similar section to section 53(2) dealing with giving Notice of Appeal. In addition there is no way that the Director could be assumed to know that the Appellant would appeal.

Having decided that the Notice of Appeal is out of time, the Board must then decide if this is a case where a hearing should be granted under Section 84(1) because the Appellant was "prevented by absence, illness or other sufficient cause" from appealing from the assessment. In the Board's opinion, there is not sufficient cause. Although there may have been a delay in delivering the Notice of Assessment because of the error in the postal code, the Notice was actually received in sufficient time for a Notice of Appeal to be given within the 21-day period. Officers of the Appellant company decided on February 5, 1990, that they wanted to appeal. They could have taken steps to ensure that the Notice of Appeal was delivered to the Recorder on February 6th. They did not take those steps.

The Board dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of September, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

WOODLAWN ET AL v. DIRECTOR OF ASSESSMENT

ASSESSMENT - NOTICE OF APPEAL - LATE FILING - PREVENTED BY SUFFICIENT CAUSE - ASSESSMENT ACT, S. 84(1) - CIVIL PROCEDURE RULES.

Company official thought Notice of Appeal had been filed and did not discover error until appeal period expired. Official then applied under s. 84(1) to be heard by Regional Assessment Appeal Court. The Court refused to grant a hearing on the merits. Company appealed to the Board which dismissed the appeal on basis of lack of jurisdiction. On appeal to the Supreme Court, Appeal Division, Board was ordered to rehear the matter.

HELD: Appeal dismissed.

The Assessment Act has strict time periods for giving, serving and filing various notices. Section 84(1) is one of the rare sections which gives a discretion to allow a person to proceed where there has not been strict compliance with the time limits. The Appellants must establish that they were "prevented" from appealing. The word "prevented" suggests that some act has occurred or not occurred. It is difficult to see how a corporate Appellant can say it was prevented from appealing because one of its officers thought another officer had taken certain steps.

The Civil Procedure Rules do not apply to Board proceedings. There is no statutory requirement for the staff of the assessment office to advise a person that he has not appealed.

NSMB-3-89-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, by **WOODLAWN SHOPPING CENTRE LIMITED** and **CLIFTON MANAGEMENT CORPORATION** from a decision of the Nova Scotia Regional Assessment Appeal Court, City of Dartmouth Assessment Region, made April 18,1989, which decision refused to grant a hearing on the merits of an appeal with respect to assessments on various properties owned by the Appellants.

BEFORE: MICHAEL G. JOHNSON, Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: JOHN MacFARLANE, Q.C., and MAURICE CHIASSON, LL.B., for the Appellants;

RANDALL R. DUPLAK, Q.C., for the Director of Assessment.

HEARING DATE: September 19, 1990.

DECISION DATE: October 1, 1990.

DECISION: **Appeal Dismissed**

D E C I S I O N

In November, 1988, **WOODLAWN SHOPPING CENTRE LIMITED** one of the Appellants, purchased the Woodlawn Mall for $4,291,000.00 from the other Appellant, **CLIFTON MANAGEMENT CORPORATION.** Shortly

after the property closing, David Bryson, President of Woodlawn contacted Richard Colbourne, Regional Director of Assessment for the City of Dartmouth. Mr. Bryson asked Mr. Colbourne about reducing the assessed value of various properties comprising the Woodlawn Mall in light of the sale. Mr. Colbourne advised Mr. Bryson that he would have to appeal the 1989 Notice of Assessment.

On January 25, 1990, Mr. Bryson advised the Woodlawn Board of Directors that the 1989 Notices of Assessment for the Woodlawn Mall totalled $4,972,000.00. The Woodlawn Board agreed to appeal the assessments and directed Charles Hardy, Vice-President of Woodlawn, to handle the appeal.

In his testimony before the Municipal Board, Mr. Hardy said that he thought Mr. Bryson had already given the Notice of Appeal as required by the Assessment Act. He did not check this nor did he review the company's files on this point.

Following the Woodlawn Board meeting on January 25, 1990, Mr. Hardy placed a call to Doug King, the assessor responsible for the Woodlawn Mall assessment. Mr. Hardy's phone log and evidence from Doug King indicate that although they returned each other's calls, it was not until January 30, 1989, that they talked to each other. Mr. Hardy said that he was trying to arrange a meeting to discuss these assessments and also assessments respecting the Royal Bank of Canada.

The telephone log shows Mr. Hardy left a message for Doug King on February 8, 1989. They spoke on February 20th and 22nd and arranged a meeting for February 28, 1990.

On February 28, 1990, Doug King advised Charles Hardy there was no notice of appeal given respecting the Woodlawn Mall properties and that he could not proceed with any adjustments of the assessments. While at the assessment office, Charles Hardy completed a late Notice of Appeal. The recorder of the Regional Assessment Appeal Court ("R.A.A.C.") then scheduled a hearing under Section 84(1) of the Assessment Act.

The time set for the hearing was not satisfactory to Mr. Hardy. He was unable to attend the hearing. He filed two affidavits and was represented at the hearing by a co-worker. Mr. King also filed an Affidavit. He attended the hearing.

One argument before the R.A.A.C. was that sufficient notice was given by the Appellants. The R.A.A.C. held that the verbal discussions "although an expression of intent, did not constitute an appeal of the assessments".

A second argument was that the conduct of Mr. King and others in the assessment office contributed to the "understanding that sufficient notice had been given" and therefore, it was an appropriate case to grant a hearing despite the late filing. The R.A.A.C. held the Appellants had failed to bring themselves within Section 84.

The Appellants appealed the R.A.A.C. decision to the Board. The Board held a preliminary hearing on September 6, 1989. The Board then decided any matter before the R.A.A.C. under section 84(1) [formerly section 98(1)] was a jurisdictional matter and not reviewable on appeal to the Board.

The Appellants appealed this Board decision to the Nova Scotia Supreme Court, Appeal Division. The Appeal Division held the Board erred. It held the decision of the R.A.A.C. could be appealed to the Board. The Appeal Division remitted the matter to the Board to decide whether the Appellants had "sufficient cause" for not appealing. The decision states:

> "If on a de novo hearing the Board finds the appellants have "sufficient cause " then it would refer the matter to the assessment appeal court to hear the assessment appeal. If, on a de novo hearing the Board finds the appellants lack "sufficient cause" it would dismiss the appeal."

Section 84(1) of the **Assessment Act** reads as follows:

> "If any person shows, within sixty days from service of the notice of assessment by oath or affidavit on ex parte application, to the satisfaction of the regional assessment appeal court, that he has been prevented by absence, illness or other sufficient cause from appealing from the assessment or from duly prosecuting his appeal, the court may grant such person a hearing and arrange a sitting of the court to hear the appeal, and the court may impose such terms as to notice and service of documents as it considers proper." [Emphasis that of the Board].

In this appeal the Appellants must show they have been "prevented" by "sufficient cause" from appealing the assessment. The Appellants argue that they were "prevented" from appealing because the officer directed to handle the appeal was under the mistaken impression that the President had given written notice of the appeal and the assessment office did not disabuse him of this fact.

The evidence before the Board shows that the Notice of Appeal should have been given by February 6, 1989. Mr. King

testified that he understood the Appellants had given Notice of Appeal. He did not discover until February 22, 1989 that no written Notice of Appeal had been given. He did not advise Charles Hardy of this fact until their meeting on February 28, 1989.

Charles Hardy did not make inquiries to ensure written Notice of Appeal was given. No one at the assessment office told him that written Notice of Appeal was on file. No one told him it was not on file. He apparently assumed his fellow director had processed the appeal.

During argument, the question of what would constitute being "prevented by sufficient cause" was raised. One example might be the situation which occurred recently where the Canada Post neglected for several days to pick up the mail from a mail box in a large office tower in Halifax. No one in authority was aware of the error until the mail box overflowed.

The **Assessment Act** has strict time periods for giving, serving and filing various notices. Section 84(1) is one of the rare sections in the Act which gives a discretion to allow a person to proceed where there has not been strict compliance with the time limits.

The Appellants in their brief raise the criteria followed by the courts in deciding whether to extend time for filing a notice of appeal. They cite Martin v. McKay (1987), 28 C.P.C. (2d) 310 (N.S.C.A.). This is a statutory tribunal appeal to the County Court. The Appeal Division held the Civil Procedure Rules applied where there was no time limit set out in the statute. The same

Rules permitted the County Court judge to consider an extension of time. The decision outlines the principles followed by the courts in considering an application to extend time. While the case is a tribunal appeal, it is to a court.

The Board does not have the same discretion as a court. The Civil Procedure Rules do not apply to Board proceedings. The Board is bound by the wording of section 84(1). The Appellants must establish that they were "prevented" by sufficient cause from appealing. The word "prevented" suggests that some act has occurred or not occurred which prohibited the Appellants from appealing.

The Appellants rely on an apparent misappreciation of the facts. Except where a mental illness exists which might cause a person to think he has done an act which he had not done, it is difficult to see how a corporate Appellant can say it was prevented from appealing because one of its officers thought another officer had taken certain steps.

There is no statutory requirement for the staff of the assessment office to advise a person that he has not appealed. One hopes that if the staff learn that a person who is negotiating his assessment has not appealed, they would advise the person. While there was a delay before Mr. King advised Mr. Hardy, the evidence establishes that Mr. King did not discover the Appellant's failure to give written notice until after the appeal period had expired.

The Board is not prepared to find in this case that the

assumption that written notice had been given together with a failure to make inquiries is sufficient cause to grant a hearing on the merits of the Appellants' 1989 assessment appeal.

The Appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 1st day of October, A.D., 1990.

MICHAEL G. JOHNSON, Chairman.

LINDA D. GARBER, Vice-Chairman.

RICHARD L. WELDON, Member.

NOVA SCOTIA MUNICIPAL BOARD.

DIRECTOR OF ASSESSMENT v. BRIMAR DEVELOPMENTS LIMITED

ASSESSMENT - CLASSIFICATION - BUSINESS OCCUPANCY - RESIDENTIAL PROPERTY - SELF-STORAGE UNITS - VACANT LAND - ASSESSMENT ACT S. 2(r), 11(1), (2), (3).

The company rents storage units to individuals and companies. Access to the storage units is by password. Each user places his own lock on the unit. The Regional Court found that units are occupied by individuals are residential property and not subject to business occupancy.

HELD: Appeal allowed in part. No costs.

To be classified as residential property, the property must be used for more than one residential purpose. The storage units are not residential property. They are not used for eating, sleeping or personal care on a continuing basis nor are they a place to which an individual returns after work. The users of the storage units are using or occupying commercial property and are liable for business occupancy. Difficulty in determining who should be assessed for each unit is not a determining factor.

No business occupancy assessment should be assessed for vacant land.

The company has control of the common areas and is occupying and using these areas and is liable for business occupancy assessment. There is no support in the case law for haivng Brimar and the users liable for business occupancy assessment for the same common area.

NOTE: Appealed to the Nova Scotia Supreme Court, Appeal Division. Appeal allowed in part.

NSMB-13-89-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act by the **DIRECTOR OF ASSESSMENT** from a decision of the Dartmouth Regional Assessment Appeal Court dated November 9, 1989, dealing with the classification and business occupancy of property located at 156 and 160 Thornhill Drive owned by **BRIMAR DEVELOPMENTS LTD.**, and operated as **METRO SELF-STORAGE.**

BEFORE: MICHAEL G. JOHNSON, Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: RANDALL R. DUPLAK, Q.C., for the Director of Assessment,

DAVID MILLER, for Brimar Developments Ltd.

HEARING DATES: JUNE 27, 1990
JULY 18, 1990.

BRIEFS SUBMITTED: AUGUST 29, 1990.

DECISION DATE: OCTOBER 10, 1990.

DECISION: **Appeal allowed.**

D E C I S I O N

Brimar Developments Limited, the Respondent, owns and operates Metro Self-Storage. Metro Self-Storage has two locations in the Halifax-Dartmouth area. This 1989 assessment appeal

concerns one of their locations, property located at 156 and 160 Thornhill Drive, in the Burnside Industrial Park, Dartmouth.

The subject property is in 2 lots. One lot is 2.36 acres and the other is 2.26 acres. As of December 1, 1988, there were two fully operational storage unit buildings on the property. Another three buildings were under construction. They have now been completed. A portion of the property has been left vacant for future development.

At the front of the property there is a parking area and a two-storey office building. The rest of the property is contained inside a high security fence. Entry to this area is through a computerized gate. There are now 5 storage buildings with paved areas around them. The buildings are divided into individual storage units of varying sizes. The storage units are rented by both individuals and companies for the storage of goods. Some of the units are used to store personal belongings that might otherwise be stored in one's house.

In 1989 the Director of Assessment assessed Brimar for business occupancy on the two completed storage unit buildings and their common areas as well as the office building and parking area at the front. Brimar appealed the business occupancy assessment on the storage unit buildings and their common areas which include the paved area around the buildings.

The Regional Assessment Appeal Court (R.A.A.C.) classified those storage units used by individuals to store excess personal items as residential property.

The R.A.A.C. also decided that the business occupancy assessment on the common areas should be assessed according to the use made of the common areas by the property owner (Brimar) and the user of a storage unit. The R.A.A.C. held that both Brimar and the user could be assessed for their use of the same common areas.

In its decision the R.A.A.C. purported to retain jurisdiction to determine the valuation of each of these uses. The R.A.A.C. also purported to retain jurisdiction to determine the valuation of the self-contained office area and open parking area.

The Director of Assessment appealed only those portions of the R.A.A.C. decision which classified some areas of the property as residential. The grounds of appeal as listed on the Notice of Appeal are as follows:

> "1. THAT the Regional Assessment Appeal Court Vice-Chairman erred when he found that those uses of access by renters who actually occupy a bay for storage of residential goods, as a residential use.
>
> 2. That the Regional Assessment Appeal Court Vice-Chairman erred in finding that rented bays occupied by residential users should be classified as residential property.
>
> 3. That the Regional Assessment Appeal Court Vice-Chairman erred in finding that, as regards portions of the common areas, that the rights of use of persons who employ a rented bay for a residential purpose should be classified as residential.
>
> 4. That the Regional Assessment Appeal Court Vice-Chairman erred in determining that the fourth aspect, the vacant land, was not in issue on the appeal as to classification."

After the Board hearing began, the Director made a motion for leave to add an additional ground of appeal. The Respondent

objected to this ground of appeal. The Board granted leave to add the ground of appeal and gave the Respondent an adjournment to respond to this new ground. The additional ground of appeal is:

> "5. Whether or not the Respondent is the occupier of the areas which are the subject of the appeal."

The grounds of appeal as set out cause the Board some concern. It is possible that the Board decision and the unappealed portions of the R.A.A.C. decision will be in conflict. This outcome should be avoided, if possible. The Board will attempt to minimize any such conflict.

The first three grounds of appeal deal with the classification of certain of the storage units and portions of the common areas as residential property.

Residential property is defined in Section 2(r) of the Assessment Act to mean "property or part thereof used or intended to be used for residential purposes, but does not include the portion of a hotel or motel used for the purpose of lodging the public".

The Respondent argues that the storage units should be classified as residential property because "the storage of excess residential and personal goods is an ordinary and usual use to which residential property is put".

The Board, in McCarthy and McEachern v. Director of Assessment, NSMB-13-89-A, May 14, 1990 (unreported), dealt with the definition of residential property and stated at pages 5-6:

> "In the Board's opinion, the words "used ... for residential purposes" in the definition of

> "residential property" in the Act requires more than being used for an activity that might occur in the home. Each case must be examined on its own facts. In determining whether the premises are "used...for residential purposes" the Board will consider, among other factors, whether the premises are used for eating, sleeping and personal care by an individual on a continuing basis and whether it is a place to which the individual returns after completing work."

The storage units are not used for eating, sleeping or personal care on a continuing basis. They are not a place to which an individual returns after work.

The Board further notes the definition reads "used or intended to be used for residential purposes". (Board emphasis). This plural ending implies that there must be more than one residential purpose.

The Board is satisfied that the storage units are not residential property and should be classified as commercial property. All the common areas are commercial property as well.

The fourth ground of appeal dealing with the vacant land is oddly worded. It asks the Board to find that the classification of the vacant land was an issue before the R.A.A.C. The ground does not ask the Board to specify what is the classification of this vacant land. The Board does not have a record of the proceedings before the R.A.A.C. Except for the decision of the R.A.A.C., no evidence was tendered to the Board of the testimony presented to the R.A.A.C. on the vacant land issue. The Board is not in a position to decide the issue as stated in the ground of appeal.

The Board is, however, prepared to state its opinion of the classification of this vacant land. The vacant land is marked for future development. It is located within an industrial park. It is not an ancilliary use to a residential building. It is clearly not residential property nor is it resource property. It is, therefore, commercial property under the Act.

This vacant land does not form part of the common areas. It has not been put to active use by Brimar. Section 11(3) of the Assessment Act provides that an owner shall not be assessed a business occupancy assessment for vacant portions of a building classified as commercial. Although there is no section specifically dealing with vacant land, in the Board's opinion, no business occupancy assessment should be assessed for the vacant land.

The fifth ground of appeal concerns who is liable for business occupancy assessment of the storage units and common areas which were previously classified as residential.

The Director argues that the persons renting the storage units merely have a licence to use them and cannot be considered tenants. The Director's position is that Brimar is liable for the business occupancy assessments. The Director views the storage units in the same way as safety deposit boxes and storage in warehouses.

Brimar argues that the storage units are similar to any commercial building in which the tenants are liable for the business occupancy assessment of the units they occupy. Brimar

cites Canadian Mini Warehouse Properties Ltd. v. Regional Assessment Commissioner et al, Ontario Supreme Court No. 579/82 dated March 4, 1982.

Section 11(1) of the Assessment Act provides that "every person occupying or using any commercial property...shall be assessed...business occupancy assessment". The words "occupying" and "using" are not defined in the Assessment Act. The word "occupancy" is defined but that word is not used in Section 11.

The Board, in T. Eaton Co. v. Director of Assessment (1984), 3-A M.B.D. 267 reviewed the various cases dealing with the meaning of "occupying or using" and concluded as follows at page 301:

> "The question of whether a person occupies or uses property for purposes of Section 7 [now s.11] of the Assessment Act is a question of fact and where more than one person exercises acts of occupation with respect to a property, it is necessary to examine the degree of control being exercised over the property by the persons occupying or using the property".

The Nova Scotia Sureme Court, Appeal Division, in Director of Assessment v. T. Eaton Co. (1985), 70 N.S.R. (2d) 65, upheld that Board's decision and stated at page 67:

> "In our opinion, the act of occupying or using commercial property within the meaning of those words as they appear in s. 7(1) of the Act involves, at least to some extent, an element of control.

In the T. Eaton Co. case the Board held that the T. Eaton Co., a tenant, did not control the common areas of the MicMac Mall and was, therefore, not liable for business occupancy assessment

for a portion of the common areas. The Board did not rule on whether or not the owner of the mall was liable for business occupancy assessment.

Following the Board and Appeal Court decisions in T. Eaton Co., the Assessment Act was amended by adding subsection (2) to Section 11. It provides as follows:

> "(2) Where commercial property is not occupied or used within the meaning of subsection (1) and that property
>
> a) is used as a utility area, common area or public area in respect of or is used ancillary to other commercial property, including another part of the same commercial property; and
>
> b) is not used for parking or, if it is, no fee is charged to persons for the parking by those persons of motor vehicles on that property,
>
> the occupiers of the other commercial property are all deemed to proportionately occupy or use that property within the meaning of subsection (1)."

Metro Self-Storage offers various sizes of storage space. Each space has its own door either to the outside or to a common hallway. A person wishing to use the storage space is required to sign a User Agreement which contains certain terms and conditions such as:

1) the user must place a lock on the door and keep the space locked;

2) the contract period is for a minimum of 4 weeks which may then be extended;

3) the space may only be used for the storage of goods;

4) there is only one electrical outlet for the sole purpose of lighting the space;

5) the space is designed for unheated/uncooled storage;

6) access to the property is by an exclusive password number through the computerized gate;

7) access to the premises is during the hours established by the owner which currently are 24 hours a day;

8) no signs etc. may be placed on the building by the user;

9) the owner has the right to inspect and relocate the space.

Unlike a safety deposit box, the user may access his space without the assistance of the owner or his staff. The lock is that of the user and the owner does not have a key.

The user determines how the goods are stored. This is unlike a warehouse, where the owner decides how and where goods are to be stored. A user cannot go immediately to his own goods in a warehouse.

In the Canadian Mini-Warehouse Properties Ltd., cited above, Mr. Justice Osborne of the Ontario Supreme Court reviewed a similar type of storage and found that the persons renting storage space were "occupying or using" the space. He made the following comments:

> "The issue here is whether the applicant in its business is a "person occupying or using land..." as contemplated by s. 7 of The Assessment Act. To a significant degree, the Respondent relied on the provisions of an alleged lease, or form of lease, used by the applicant in its dealings with its customers (Record p. 7). The Respondent contends this agreement results in the relationship of licensor-licensee, between the applicant

> and those using its warehousing facilities. I do not think that the obligation of the applicant to pay business tax is exclusively a product of the presence or absence of a landlord-tenant relationship between the applicant and those using its mini-warehouses. I am satisfied that the relevant particular areas (the mini-warehouses) are used and occupied by the tenants or customers of the applicant. There is a sufficient degree of exclusivity in the circumstances to support that conclusion. Those restrictions referred to by counsel for the respondent to not suggest an absence of occupation and use of the warehouses by the applicant's customers. This somewhat novel landlord-tenant relationship is not to be equated, or realistically compared with a regular warehousing operation, where facilities are generally available on a first come, first served basis and concepts of bailment are involved. The hours that the applicant keeps its secured premises open, the restrictions on use of the mini-warehouses, the security arrangements (including the responsibility for security) and the general restrictions on a tenant's freedom of movement, do not dilute the fact that these mini-warehouses are used and occupied by those of whom they are leased (see Westminster v. Southern Railway et al [1936] A.C. 511 at 527 - 532)".

The Board agrees with the conclusion of Mr. Justice Osborne. The users of Metro Self-Storage are "persons using or occupying" commercial property. Before concluding that they are liable for business occupancy assessment for the storage space that they occupy, it is necessary to consider the meaning of "occupancy" in Section 2(m) of the Act which provides that it "includes a landlord where the average period of occupancy by individual tenants is less than three months".

Although, as noted above, Section 11(1) does not contain the word "occupant" the Board feels it should examine the average period of occupancy by individual tenants.

An assessment is required to reflect the state of property as it existed on the first day of December immediately

preceding the filing of the roll. In this case, it is December 1, 1988.

Brimar produced an Exhibit showing the various rental periods of all the storage units which were leased on or before December 1, 1988. The Exhibit shows both the number of months of occupancy up until December 1, 1988 and the total length of occupancy until June 1990 for each of the tenants occupying a space on December 1, 1988. There are a total of 456 storage units in the two buildings. On December 1, 1988, 327 of them were rented. Users were divided into residential or commercial customers on the basis of the name used on the User Agreement.

The following chart, prepared by the Board, summarizes some of the information from the Exhibit. The figures all relate to the 327 units which were occupied on December 1, 1988. The first set of figures shows the situation in December, 1988 while the second set is looking back over the entire period until June, 1990.

LENGTH OF OCCUPANCY

	As at Dec./88		As at June/90	
	3 mos. or less	Avg.	3 mos. or less	Avg.
RESIDENTIAL	194 units	3.2 mos.	96 units	6.48 mos.
COMMERCIAL	29 units	3.60 mos.	19 units	6.34 mos.
TOTAL	223 units	3.25 mos.	115 units	6.46 mos.
PERCENT	68.2%		35.2%	

While the chart shows that 68.2% of the users had occupied their space for 3 months or less on December 1, 1988, the

overall average length of occupancy of all occupied units, as of that date, was 3.25 months.

Given the wording of Section 2(m) "where the average period of occupancy by individual tenants is less than three months", it is the overall average length of 3.25% which governs and not the fact that the majority of users had leased for three months or less. On this basis, the landlord cannot be found to be the occupier of the storage units.

The Board is aware the assessor may face difficulties in trying to decide who should be assessed business occupancy for each unit and for what period in any given year. The Board does not consider this difficulty to be a determining factor.

The Director has also asked the Board to rule who is liable for business occupancy assessment of the common areas.

The storage unit buildings and common areas are enclosed by a security fence. The area is for the use of Brimar and the users of the units. The user needs a place to park a vehicle and access to its unit while on the premises. No one is permitted access without a password for the computerized gate, unlike a shopping centre.

Using the test set out in the T. Eaton Co. case, the Board finds that Brimar has control of the common areas, including the paved areas around the buildings. It is, therefore, occupying and using these areas. It is not necessary to consider Section 11(2) which only applies when no one is occupying the common areas. The Board finds that Brimar is liable for the business occupancy

assessment of the common areas.

This portion of the decision appears to be in conflict with an unappealed portion of the R.A.A.C. decision which found that both the commercial users and Brimar were liable for business occupancy assessment for the common areas. The case law on "occupying and using" indicate that one person having the ultimate control is the person liable for business occupancy assessment. [If no person is found to be in control then the common area is not occupied and Section 11(2) applies]. There is no support in the case law for having both Brimar and the user liable for business occupancy assessment for the same common area. The reference to "parts" relied on by the R.A.A.C. is with respect to parts of a building or property and not to different uses of the same "part" of the property.

The Director did not request the Board to transfer the business occupancy assessment to the persons who occupy the individual storage units. If asked to do so, the Board would decline since those persons were not given notice of the appeal.

In summary, the Board makes the following findings:

1. Those storage units which were classified residential property by the R.A.A.C. are reclassified as commercial property.

2. Brimar Developments Ltd. does not occupy the storage units and is not liable for business occupancy assessment for those storage units.

3. Brimar Developments Ltd. is liable for business

occupancy assessment for all common areas including the paved areas around the buildings.

4. The vacant land described for future development is classified commercial. No business occupancy assessment arises with respect to the vacant land.

The Board makes no findings with respect to valuation since no evidence was placed before the Board on this issue.

The Board determines that each party should bear its own costs.

The Appeal is allowed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of October, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

CURRAN v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RESIDENTIAL - VALUATION.

The Appellant argued the property had been assessed too high in relation to other property. At the hearing, the assessor filed an appraisal report which reduced the assessment from $147,000.00 to $133,400.00. A general level of assessment factor of 98.2% was applied.

HELD: Appeal allowed, value set at $135,400.00. No costs awarded.

NSMB-7-90-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An appeal under the Assessment Act, R.S.N.S. 1989, c. 23 by RALPH CURRAN and GERTRUDE CURRAN from a decision of the Regional Assessment Appeal Court, Halifax City Assessment Region, dated the 17th day of May, 1990, and received by the Appellants on the 21st of May, 1990.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: RALPH CURRAN on his own behalf and on behalf of the other Appellant, Gertrude Curran,

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: October 17, 1990.

DECISION DATE: October 22, 1990.

DECISION: Appeal Allowed.

D E C I S I O N

This is an appeal by the resident owner from a residential assessment set by the decision of the Regional Assessment Appeal Court, Halifax City Assessment Region (R.A.A.C.) made May 17, 1990, and received by the Appellants on May 21, 1990.

The residential property concerned is 53 Southill Drive, Halifax, Nova Scotia.

PRELIMINARY MATTERS

No party raised any preliminary issues. After the events at the hearing the Board took no view of the property.

JURISDICTIONAL MATTERS

Both parties active before the Board consented to the Board's jurisdiction to hear the appeal. The Board finds that the Appellants have done all that is required to prove that the Board has jurisdiction to hear this appeal. The Board therefore determines that it has such jurisdiction.

PROCESS OF THE APPEAL

Under Section 16(1) of the Municipal Board Act, R.S.N.S. 1989, c. 297, the Chairman assigned Board Member Richard L. Weldon to the Board sittings for the conduct of this appeal.

No party made opening remarks. The Appellant, Ralph Curran, testified on his own behalf. Mr. Duplak, Counsel for the Director of Assessment, called David MacDonald, the Assessor. Mr. Duplak and Mr. Curran made closing, agreeing arguments.

The operative part of the Appellant's Notice of Appeal reads:

> "The specific reason for my appeal is that the Appeal Court's decision was inconsistent in that it granted a 5% reduction to this property while, based on the same evidence, it granted a 10% reduction to 120 Tangmere Crescent.
>
> These properties are very comparable and are located on opposite corners of Southill Drive. The main differences are that 120 Tangmere Crescent has a complete "In-Law" suite in the basement, has a larger lot and as a result has consistently been assessed approximately

$4,000.00 higher than 53 Southill."

ISSUES

Is the decision of the R.A.A.C. as to valuation correct? If not, what is the correct assessment?

ARGUMENT

Mr. Curran said that he had read the appraisal prepared by the assessor called by the Director and agreed that the amount was so close to being correct that he could not disagree with it. The Director conceded that the appraisal was correct and that all requirements of the Act had been met in arriving at that valuation.

FACTS

A short study of the history of the assessment of this property may be of use. The assessment originally set was $147,000.00. On appeal to it, the R.A.A.C. valued the subject property at $139,700.00. The valuation of the subject property agreed upon between the parties at the Board hearing and proven by the Director in his latest assessment is $133,400.00. That last appraisal was made after this appeal was launched.

When arriving at his value by the market data approach, Mr. MacDonald applied the appropriate general level of assessment factor (98.2% to his main comparable market value. In his cost approach to valuation, Mr. MacDonald also used this general level of assessment factor. He testified that he used those two net

figures to arrive at the value of the subject property. His argument was that the general level of assessment was thus included in his valuation of $133,400.00, the final estimate of market value.

DELIBERATIONS OF THE BOARD

The Board has considered these arguments and this evidence. After the full inquiry required by the Assessment Act, the Board sets market value for assessment purposes of the subject property as at the effective date of January 1, 1988, for the assessment year 1990 in the sum of $133,400.00. Therefore, it allows the appeal from the decision of the R.A.A.C.

No party asked for costs. The Director has implicitly conceded the previous errors in assessment. That being the case, the Board will not order costs against the Director in this matter. Each party shall bear his own costs.

An Order shall issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of October, A.D., 1990.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

CUNNINGHAM v. DIRECTOR OF ASSESSMENT

ASSESSMENT - NOTICE OF APPEAL - LATE FILING - PREVENTED BY SUFFICIENT CAUSE - ASSESSMENT ACT, S. 84(1).

R.C., on learning that costs of needed repairs might reduce the amount of assessment appealed to the Dartmouth Regional Assessment Appeal Court. As he was out of time the matter was set down for a hearing under Section 84(1). The Court refused to grant a hearing on the merits.

HELD: Appeal dismissed.

The assessor agreed that necessary repairs of the nature described might form the basis of a reduction in assessment. While the Board is sympathetic, it does not believe that the facts establish that R.C. was prevented by sufficient cause from filing his appeal on time.

NSMB-5-90-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the **Assessment Act** by **RONALD and MARGARET CUNNINGHAM** from a decision of the **DARTMOUTH REGIONAL ASSESSMENT APPEAL COURT** dated March 20, 1990, respecting 13 Lawnsdale Drive, Dartmouth.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: RONALD CUNNINGHAM on his own behalf and on behalf of this wife, MARGARET CUNNINGHAM;

RANDALL R. DUPLAK, Q.C., for the Director of Assessment.

HEARING DATE: October 30, 1990.

DECISION DATE: November 1, 1990.

DECISION: Appeal Dismissed.

D E C I S I O N

Ronald and Margaret Cunningham own a home at 13 Lawnsdale Drive in Dartmouth. The 1990 real property assessment of the home is $117,400.00.

The house was built in approximately 1957. It now needs a new roof and to have the chimney rebuilt. Mr. Cunningham received an estimate of $6,000.00 to do these repairs.

Sometime in February, 1990, Mr. Cunningham learned that

a neighbour had successfully appealed his assessment on the basis of necessary repairs.

On February 16, 1990, Mr. Cunningham sent a Notice of Appeal to the Recorder of the Dartmouth Regional Assessment Appeal Court. Mr. Cunningham was aware that his appeal was late. His reason for not giving notice within the statutory 21-days was that he was unaware that necessary repairs could be used to reduce the assessment.

The Recorder received the Notice of Appeal on February 19, 1990. The Recorder proceeded under Section 84(1) of the Assessment Act (formerly s. 98(1)) to set the matter down to be heard on March 19, 1990. The section allows the Regional Assessment Appeal Court to grant a hearing despite the late filing of the Notice of Appeal where it is satisfied that a person:

> "has been prevented by absence, illness or other sufficient cause from appealing the assessment..."

The Vice-Chairman of the Regional Assessment Appeal Court in a decision dated March 20, 1990, refused to grant a hearing. He was not satisfied that Mr. Cunningham had been prevented by sufficient cause from appealing the assessment.

Mr. Cunningham sent a letter to the Regional Assessment Appeal Court following the receipt of the decision on March 27, 1990. He was subsequently advised of his right to appeal to this Board.

Mr. Cunningham then wrote a letter addressed to the Board which he took to the Recorder on April 25, 1990. The Recorder

apparently undertook to serve copies of the Notice of Appeal on the various parties. She forwarded his letter to the Legal Services Division of the Department of Municipal Affairs. Mr. Duplak, subsequently, forwarded the letter to the Board by letter dated May 15, 1990, which the Board received on May 16, 1990.

At the Board hearing, Mr. Cunningham reviewed his reasons for wishing to appeal his assessment. He advised the Board that the repairs had not been undertaken.

David MacDonald, Senior Assessor with the Dartmouth Assessment Region, testified. He agreed that necessary repairs of the nature described by Mr. Cunningham might form the basis of a reduction in assessment. Mr. MacDonald had not undertaken any review of the 1990 assessment of the subject property. He filed a report, Exhibit C-2, which dealt solely with the issue of late filing of the Notice of Appeal.

At the Board's request, Mr. Duplak gave an undertaking that the Director of Assessment would review the assessment of 13 Lawnsdale Drive to determine if the 1991 assessment should be reduced. Such a review will require that an assessor do an inspection of the property. Mr. Cunningham was agreeable to this. If Mr. Cunningham is not satisfied with the review, he will have an opportunity to appeal the 1991 assessment.

The Appeal before the Board was limited to the question of whether or not the Cunningham's should be granted a hearing by the Regional Assessment Appeal Court. The Board could not, at this stage, make any determination on the assessed value of the

property.

The Board has reviewed the wording in Section 84(1) which allows a hearing in certain circumstances. While the Board is sympathetic to Mr. Cunningham's situation, it does not believe that the facts meet the requirements of the section. The Board cannot find that Mr. Cunningham was prevented by sufficient cause from filing his appeal on time.

The Board dismisses the Appeal.

The Board declines to award costs in this appeal.

DATED at HALIFAX, Nova Scotia, this 1st day of November, A.D., 1990.

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

MacINTYRE v. DIRECTOR OF ASSESSMENT

ASSESSMENT - NOTICE OF APPEAL - FAILURE TO SERVE IN ACCORDANCE WITH STATUTE - ASSESSMENT ACT S. 81(1).

F.M. failed to serve Director of Assessment.

HELD: **Appeal dismissed.**

NSMB-11-90-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act R.S.N.S. 1989 c. 23 by FRASER MacINTYRE from a decision of the Regional Assessment Appeal Court for the Municipality of the County of Cape Breton, respecting property at 343 Grove Street, Birch Grove, Nova Scotia.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: FRASER MacINTYRE on his own behalf;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: December 13, 1990.

DECISION DATE: December 17, 1990.

DECISION: Appeal Dismissed.

D E C I S I O N

The Appellant, trying to perfect his appeal under Section 81(1) of the Assessment Act, failed to serve a Notice of Appeal on any Director of Assessment thus losing his right to appeal and the Board dismisses his appeal: An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of December, A.D., 1990.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.